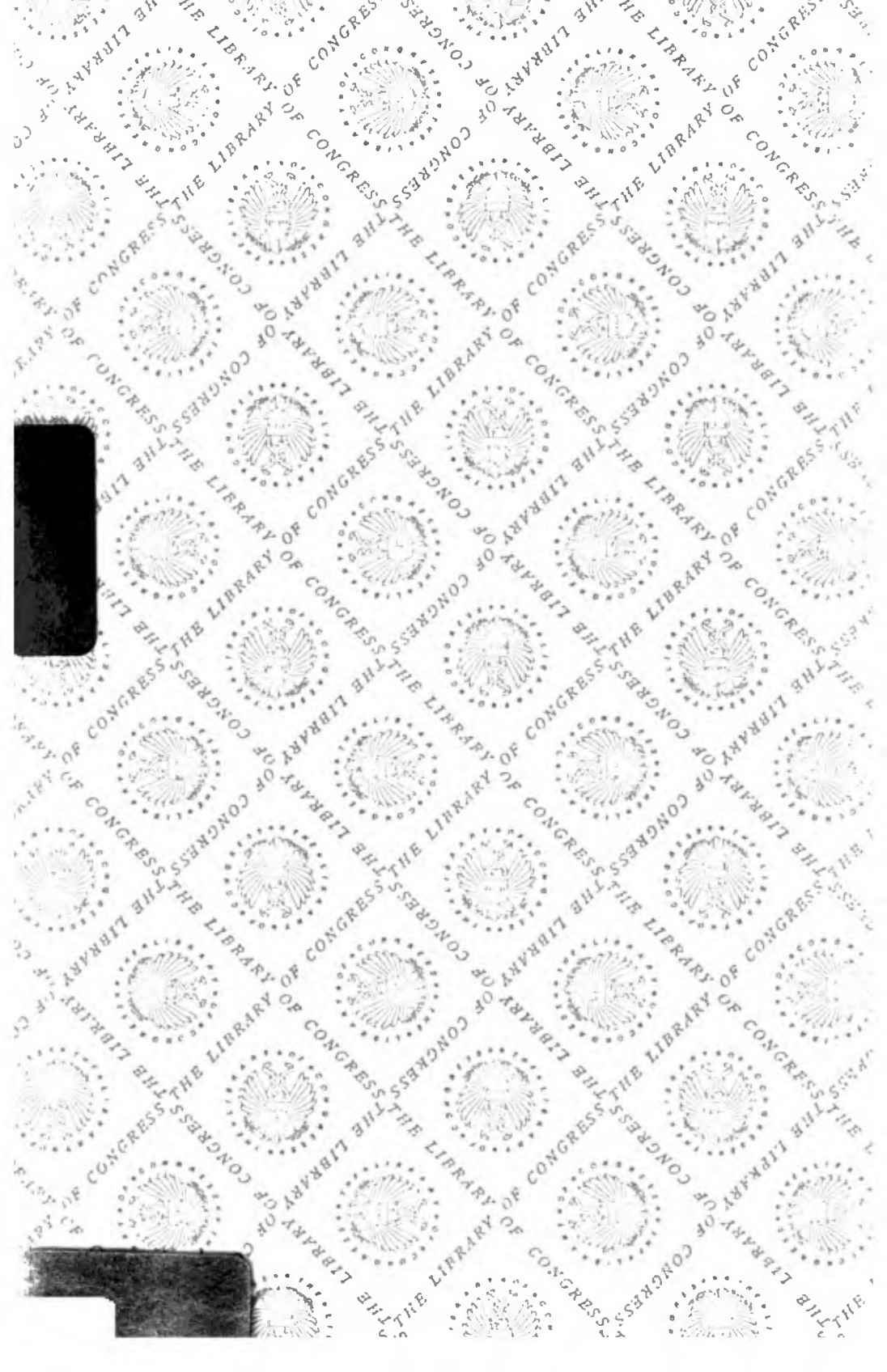

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 10

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

FEBRUARY 14 AND 15, 1979

Serial No. 1

Printed for the use of the Committee on the Judiciary

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CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

WEDNESDAY, FEBRUARY 14, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m. in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mikva, Gudger, Danielson, Moorhead, and Sawyer.

Also present: Timothy A. Boggs professional staff member, Gail Higgins Fogarty, counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

I am very pleased to begin the subcommittee's official activities of the 96th Congress with hearings on H.R. 10, legislation to help protect the rights of institutionalized persons.

INTRODUCTION

As some members of the subcommittee know, this legislation received the attention and support of the subcommittee, the full committee, and the full House during the 95th Congress. We secured the nearly unanimous support of the committee and a vote of 254 to 69 in the full House. The provisions of H.R. 10 largely reflect these weeks of debate and markup. The Senate Judiciary Committee also reported similar legislation, S. 1393, but in the busy last days of the session, no time was available on the Senate floor for consideration of the bill which consequently died without a vote by that body. Senator Bayh has reintroduced his bill, now labeled S. 10, and this year we have gotten off to an earlier start in both Houses. We hope to give these bills a fair hearing and a full opportunity for enactment. Today is the first of 2 days of testimony and I have scheduled 2 days of markup next week.

This subcommittee has jurisdiction over this legislation for two reasons. First, we have a responsibility for the "corrections" portion of the Federal criminal justice continuum. Generally this is a responsibility for oversight of the Federal Bureau of Prisons, the U.S. Parole Commission and the U.S. Probation Service. However, we also have a duty with respect to the Federal impact on State and local correctional institutions and programs, and of course, this legislation could have a

significant impact on both. Second, the subcommittee has jurisdiction over issues of "access to justice." In this regard we have been very active on attorneys' fees legislation and oversight of the Legal Services Corporation. Also, we will again be considering legislation this session which will modify Federal court jurisdiction and structure in order to permit swift and fair access of citizens generally to the Federal courts. I believe that the legislation before us then is part of our "access to justice" responsibilities.

PURPOSE AND NEED

The primary purpose of H.R. 10 is to grant clear standing to the Attorney General of the United States to initiate civil actions to protect institutionalized persons from a "pattern or practice" of conditions which are caused by "State action" and which deprive these citizens of rights which are protected by the Constitution or laws of the United States.

I can think of no constituency less able to secure its own access to justice under the Constitution and laws than the mentally ill and handicapped, institutionalized children, the elderly, and prisoners. At present, these Americans are left to fashion their own complaints, frequently confronting recalcitrant institutional administrators and busy Federal courts, which are ill equipped to consider the motions of inarticulate nonlawyers from the most powerless segments of our society.

Of course, not all institutionalized people are unrepresented. Some of the most distinguished public interest lawyers in the nation have brought fundamental landmark litigation to the Federal courts in behalf of institutionalized clients.

In our work on the civil rights attorneys' fees legislation and in our ongoing efforts with regard to the Legal Services Corporation, as well as general issues of corrections and court access, the subcommittee and staff have had the privilege of working with many of these fine lawyers. Some of them will be witnesses on this legislation this week. Indeed, I am pleased to note that both of the Assistant Attorneys General who have assisted in the preparation of the administration's position on this legislation, Ms. Patricia Wald and our witness today, Mr. Drew Days, have come from well respected public interest practices.

The caliber of the public interest bar notwithstanding, it is unacceptable to me to leave the enforcement of the constitutional rights of institutionalized citizens entirely in the hands of a small, overworked, underpaid portion of the bar which has voluntarily chosen to make it its business to represent these clients.

Clearly this is an area where the resources of the Department of Justice are needed to bring suit in the most egregious situations and provide the continuity and staying power that are frequently necessary to insure compliance following complex civil litigation such as this. The need for statutory authority to expend such resources is critical, since three Federal district courts and one circuit court of appeals have recently refused to allow the United States to initiate suits in this area without specific statutory authority.

A secondary purpose of H.R. 10 is an optional provision which will permit the continuance of cases brought in Federal court by State prisoners in order to require use of certified administrative grievance procedures. This provision will not only help the clogged Federal court dockets, but will free the States of the burden of defending themselves in court against many individual prisoner complaints and will provide prisoners with a speedier, more appropriate forum for the resolution of their complaints. This provision is based on the quite successful California Youth Authority system which the subcommittee studied. As Attorney General Bell stated in a letter to the committee members in support of the legislation:

> This provision will encourage but not require, states and political subdivisions to seek certification of their grievance mechanisms. If States avail themselves of this opportunity, the result should be a significant improvement in prison operation and relief of prisoner litigation caseloads in Federal courts.

This provision was proposed by the distinguished ranking minority member of the subcommittee, Mr. Railsback, and I congratulate him for his fine efforts on this bill. Before introducing our first witness today, I would like to suggest that Congress has only just begun to shoulder its share of responsibility for protecting the basic rights and needs of institutionalized citizens and this legislation should be considered as part of that initial effort. In recent years Congress has enacted the Developmental Disabilities Act, the Education of All Children Act, the Juvenile Justice Act, and the Parole Commission and Reorganization Act. Each of these has affected or served as models for the operation of State institutions. I strongly support these efforts. But I also believe that the House, in approving this legislation last year recognized that we have not met our entire obligation in this area. Indeed, Congress has followed the lead of the courts and such courageous Federal judges as Frank Johnson of Alabama who have been much more willing to recognize the rights of institutionalized Americans.

I believe it is time we do our share and I hope these hearings will be the beginning of a swift and fair legislative effort on this issue.

At this time, without objection, I would like to include the remarks following mine of the gentleman from Illinois, Mr. Railsback, who has a prepared statement but is not here this morning.

[The prepared statement follows:]

STATEMENT OF HON. TOM RAILSBACK, ON H.R. 10

Mr. Chairman: I support H.R. 10, a bill to authorize civil action in cases involving deprivations of rights of institutionalized persons protected by the Constitution or laws of the United States.

Our Subcommittee has been visiting institutions, primarily prisons, throughout the country since 1971. Some of the places we visited defy description. They are not located in any one area of the country. You can find them in Illinois, Alabama, New York, Maryland, Texas, Pennsylvania, Michigan, California, and probably every State in the Union. There are some good facilities, but there are many bad ones and when they are bad, they are really bad.

In the case of *Wyatt* v. *Stickney* in 1971, the record revealed that Alabama's mental hospitals were severely overcrowded and understaffed. Retarded persons were tied to their beds at night in the absence of sufficient staff to care for them. One participant was regularly confined in a strait jacket for nine years, as a result of which she lost the use of both arms. The State ranked 50th in the nation in per patient expenditures and the less than 50 cents per patient per day

spent on food expenditures resulted in a diet "coming closer to punishment by starvation than nutrition."

The conditions documented in *Wyatt* were not unique to Alabama facilities. In a suit challenging the adequacy of care at New York's Willowbrook State School for the Mentally Retarded, the trial record revealed equally appalling conditions. Participating as litigating amicus, the Department assisted plaintiffs in producing evidence of massive overdrugging of retarded children by staff, and physical abuse of weaker residents by stronger ones. In the absence of adequate supervision, children suffered broken teeth, loss of an eye, and loss of part of an ear bitten off by another resident. In an 8-month period, the 5,000 resident facility reported over 1,300 incidents of injury patient assault, or patient fights. Unsanitary conditions led to 100 percent of the residents contracting hepatitis within 6 months of their admission. The trial court characterized conditions at Willowbrook as "shocking", "inhumane", and "hazardous to the health, safety, and sanity of the residents."

In a 1974 case challenging conditions in Texas' five juvenile detention facilities, the Justice Department was ordered by the court to appear as litigating amicus. After a year of discovery and six weeks of trial, the court determined that the staff was engaging in "a widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates." Brutality was found to be "a regular occurrence * * * encouraged by those in authority." Juveniles were teargassed. Selected youth were confined in cells lacking "the minimum bedding necessary for comfortable and healthful sleep," while others were denied regular access to bathroom facilities. Some were placed in homosexual dormitories as a form of punishment.

I could go on, Mr. Chairman. The problems are well documented. There are serious problems which are very real to those people and families involved. To the most imaginative, many institutions in this country are no more than human warehouses. They warehouse the young, the old, the feeble-minded, the sick. We are talking about approximately one million persons who reside in these institutions. They are the most vulnerable people in our society. I can assure you that there are very few lobbyists waiting to see you on this legislation. You can also be assured that there are very few votes to be gained by supporting it, but I can assure you that this bill is a good faith, modest effort to try and help these people obtain some decent, humane treatment and living conditions.

H.R. 10 will not create a whole new panoply of rights for these people. It creates no rights for anyone nor would it change existing practice of the Department of Justice. For years, the Department has been selectively suing certain state officials for the conditions of their institutions. Recently, their standing to sue in the name of the United States has been challenged. The district court and the 4th Circuit Court of Appeals have held that without specific statutory authorization, the Department of Justice has no standing to file suit against state officials. So, to date the Department has been bringing suits in this area under much broader authority and no one has suggested that they have gone crazy, suing state officials all over the country.

The Department's authority was, until recently, much broader than that contained in H.R. 10. In H.R. 10 there must be a state action, there must be a pattern and practice of violations, it must be a case of general public importance, and there must be a period of negotiation with the state.

Another positive feature of H.R. 10 is to reduce the burden on the federal courts of prisoner suits brought under 42 U.S.C. 1983. Such suits are currently being filed at an annual rate of nearly 7,000 cases, or approximately 5 percent of the civil caseload of all federal district courts. A petition filed under 1983 is handwritten by the inmate without the assistance of a lawyer and is very difficult to process.

H.R. 10 would encourage states to develop meaningful grievance procedures by requiring the United States Attorney General to promulgate minimum standards relating to the development of an effective system for the resolution of prisoners' grievances. The State would have the option to have their system certified by the Attorney General. Once a state's system has been certified, a federal judge may require that a state inmate use that system. Administrative remedies would eliminate from the federal courts at least the cases decided favorable to the prisoner.

In conclusion, Mr. Chairman, I would like to repeat that this legislation was originally recommended by the Ford Administration in February, 1976, and is supported by this Administration. I urge my colleagues to support H.R. 10.

Mr. KASTENMEIER. I would like to greet our first witness, the Honorable Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice. Mr. Days has been here before us before on this issue and others and has presented the position of the Justice Department in a very competent fashion. So we are very pleased to greet him back, together with the Deputy Assistant Attorney General who accompanies him, Mr. John Huerta.

TESTIMONY OF HON. DREW S. DAYS III, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOHN HUERTA, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. DAYS. Thank you, Mr. Chairman.

I am pleased to appear before the subcommittee to testify on H.R. 10 which would clarify the authority of the Attorney General to initiate actions involving institutionalized persons. And I, too, want to welcome the new members to this subcommittee. I did appear before this subcommittee last year on the predecessor to H.R. 10 and I'm hopeful that my testimony today will give you a clear sense of the need for this legislation.

The Department of Justice supports the provision of H.R. 10 which grants the Attorney General authority to institute civil actions in Federal courts to redress deprivations of constitutional rights. I appeared before the subcommittee on April 29, 1977 in support of H.R. 2439 which was introduced to accomplish that same purpose and later passed the House in amended form as H.R. 9400. I also testified on January 24 of this year before the Subcommittee on Child and Human Development of the Senate Committee on Human Resources, chaired by Senator Alan Cranston, on the subject of abuse of children in institutions. At that time, I suggested that this legislation, which would authorize the Attorney General to be an advocate for those least able to articulate and seek redress for deprivations of their rights, provides one way in which the Federal Government can express its concern that all institutionalized persons be treated in a constitutional manner. Because that testimony details many of the conditions that give rise to litigation I would like to request that it be included in the record of this hearing as an appendix to my present testimony.

Mr. KASTENMEIER. Without objection, the statement you have described will be accepted and made part of the record. [See app. 2, item a.]

Mr. DAYS. Thank you, Mr. Chairman.

Just this past Friday, February 9, I testified on S. 10, the Senate version of this legislation, before the Judiciary Subcommittee on the Constitution. I do not propose to repeat all of the points which I made in my April 1977 testimony. What I would like to do today is bring the subcommittee up to date on some of the developments in our litigation which have taken place subsequent to my appearance and to address some important provisions in H.R. 10.

As I stated in my prior testimony, the Department of Justice has been involved in litigation involving the rights of institutionalized persons since 1971. Nearly all of that involvement has been through intervention or participation as litigating amicus curiae in ongoing

private litigation. Our experience in that litigation convinced us of two things: One, that the basic constitutional and Federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis that Federal involvement is warranted, and two, that the United States must have the clear authority to respond to serious deprivations of such rights which come to our attention, regardless of whether a suit has been filed by private parties.

In recognition of those needs we instituted, in 1976, three suits against institutions in which our investigations had produced evidence that unconstitutional conditions existed. Two of those suits concerned State institutions for mentally ill and mentally retarded citizens, and the third involved a large county jail. In all three of those cases, the district court dismissed our compaint on the basis that the United States does not have the right to bring suits to redress deprivations of the constitutional rights of institutionalized persons absent specific statutory authority. The *Solomon* decision which involves the Rosewood State Hospital in Mayland was affirmed by the court of appeals and the *Mattson* case, involving the Boulder River State Hospital in Montana has been argued and is pending before the court of appeals in the Ninth Circuit. Defendants have cited the decision in *Solomon* as authority for motions to dismiss the United States as plaintiff-intervenor in several cases. We have been successful in defeating most of those motions. However, one district court has suggested that the United States lacks the requisite standing to intervene in ongoing private litigation.

Especially significant to the subcommittee's consideration of this legislation is the fact that district courts have continued to request the participation of the United States in institutions litigation, which I believe demonstrates a recognition by some courts of the significant contribution which we can bring to these suits based upon our fact-gathering capability and expertise acquired through our past experience in litigating these complex issues. For instance, the District Court for the Western District of Kentucky requested our participation in a suit alleging unconstitutional conditions of confinement in the Eddyville State Penitentiary, and the District Court for the Western District of Texas ordered our participation in a suit challenging conditions of confinement for approximately 900 inmates residing in the Bexar County Jail. The allegations in that suit include serious overcrowding, limitations on access to legal materials, and episodic outbursts of violence.

We are committed to continuing to participate in these kinds of cases where possible. However, this legislation proposed by H.R. 10 is important in at least two significant ways. First, it would provide the clear statutory authority which is necessary so that we can channel our legal resources into addressing the serious problems which we know exist in the kinds of institutions covered by the bill rather than in litigating questions concerning our authority to be in court. Second, the legislation would allow us to allocate our resources more effectively to pursue violations of constitutional rights where no private litigation has been brought.

When I appeared before the subcommittee approximately a year and a half ago, I described in great detail the conditions which have come to light in many of the cases in which we have been involved.

Indeed, that testimony, along with the published record of the Senate hearings on S. 1393 in the summer of 1977 is full of factual accounts which provide support for the need for this legislation. I spoke then of life-threatening situations in prisons and mental health facilities in a number of different States such as physical abuse of residents and gross neglect of basic medical needs—conditions under which no person in the United States should be forced to exist.

Let me share with you some examples from a case which was decided in December 1977 by the court in the Eastern District of Pennsylvania concerning the Pennhurst State School and Hospital, a large residential institution for the mentally retarded. I personally argued before a panel of the U.S. Court of Appeals for the Third Circuit on January 9th of this year that the evidence introduced at the 32-day trial amply supported the district court's findings of unconstitutional conditions of confinement.

The court found that physical restraints are used excessively because of staff shortages, and that these restraints are potentially physically harmful and have, in fact, caused injuries and at least one death. Dangerous psychotrophic drugs are often used for control of patients and for the convenience of staff rather than for treatment or habilitative purposes. The side effects of such drugs, besides general lethargy, include hypersensitivity to sunlight, inability to maintain balance, and a gum condition marked by inflammation, bleeding and increased growth.

The court concluded that this large, isolated institution which had been in use since 1908 was an inappropriate and inadequate facility for the habilitation of retarded persons when judged in light of the presently accepted professional standards of care. I think it is significant to note the court's finding that although the State legislature had in November 1970 appropriated $21 million for the purpose of planning, designing, and constructing community-based facilities which would enable 900 Pennhurst residents to be transferred to a more appropriate environment, 7 years later only 37 residents had directly benefitted from the legislation. Equally significant is the court's finding that such community-based facilities are, in the longrun, less expensive to operate than large facilities such as Pennhurst.

Mr. KASTENMEIER. Mr. Days, to facilitate our understanding of such a case, I wonder if you could indicate what the defense was by the offending institution. You have indicated your case and the lower court made certain findings and sustained your point of view, but sometimes it's difficult to understand what the defense rests on and what other issues may be involved.

Mr. DAYS. Yes; well, the defense of the State in the Pennhurst case, apart from asserting that it was not a proper matter for a Federal court consideration or the involvement of the Federal Government for that matter, the State's defense was simply we are trying as hard as we can; we realize that there are problems and we are trying to deal with them. Of course, the record demonstrated that while the State was attempting to deal with these conditions, people were being subjected to severe conditions, brutal treatment, the type of overmedication that I described. In fact, the lead plaintiff in the case was able to establish through her attorney that she had been the subject of 40 separate incidents of physical abuse while she was a resident of

that institution. So there really was no defense, if you will. It was simply a washing of the hands with respect to a terrible condition, a lack of coordination, a lack of pressure, if you will, from the outside to get the job done.

Mr. KASTENMEIER. Thank you. Obviously, the State felt strongly enough to appeal the matter and I just wondered whether it had any really compelling defense to make that justified their case.

Mr. DAYS. Well, of course, it's difficult for me not to speak as an advocate under these circumstances, particularly since I argued the case, but I think it is accurate to say that the defense of the State was a nondefense. It was simply saying that we have tried to deal with the problem and haven't been able to get around to it yet.

Mr. KASTENMEIER. Thank you.

Mr. DAYS. I was very pleased to note that the preintervention certification requirements contained in H.R. 9400 have been deleted from H.R. 10. We recommend that the committee report make clear that in the face of the statute's silence on the issue, the right to intervene would be left to the present state of the law. Our experience with cases in which we have intervened and others we have researched suggests that statutory authorization is not necessarily required for intervention pursuant to rule 24 of the Federal Rules of Civil Procedure, the provision on which we presently rely in most cases for intervention purposes.

We are all well aware that one of the most difficult aspects of determining the appropriate Federal role in addressing the case and treatment of persons in State institutions is the inherent balancing of competing State and Federal responsibilities and authorities. Our Federal system and equity both demand that appropriate State officials have an adequate opportunity to correct alleged conditions before they are named as defendants in a lawsuit instituted by the Federal law enforcement agency. For this reason, the Justice Department supports the inclusion of provisions such as those in H.R. 10 that require not only notice to appropriate State officials, but also the opportunity to correct the alleged conditions. I can assure you that if such legislation is enacted, the Department will take very seriously its duty to comply with these provisions. Moreover, the Attorney General's authority to file suits such as those contemplated by this legislation must be tempered with a guarantee that the force of the Federal Government will be reserved for those circumstances where the violations of rights are grave in nature and so extensive in scope that they suggest more than isolated instances of mistreatment or injustice.

Our involvement in lawsuits on behalf of persons in correctional facilities has been a major component of our litigation on behalf of institutionalized persons. We are convinced that without our ability to be so involved many instances of the denial of prisoners' rights might go uncorrected because of the limited private resources available to undertake the investigations necessary for the successful prosecution of such suits. We support strongly the inclusion of prisoners among those on whose behalf the Attorney General will be explicitly authorized to sue.

We have some concern, however, that section 2 of H.R. 10, while it authorizes the Attorney General to initiate litigation to vindicate "rights, privileges, or immunities secured or protected by the Con-

stitution or laws of the United States" limits such lawsuits in the case of prisoners to circumstances where "such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States."

I note with approval that in H.R. 10 this limitation does not apply to juveniles awaiting trial or other pretrial detainees. However, we would prefer to have no such limitation at all on the Attorney General's authority with regard to suits on behalf of prisoners.

Section 4 of H.R. 10 requires that the Attorney General promulgate minimum standards relating to the development and implementation of a speedy and effective system for the resolution of prisoners' grievances. In that process he must consult with State and local agencies and persons and organizations with expertise in corrections. In addition, the standards must conform to certain minimum statutory requirements. Grievance resolution systems that are submitted to the Attorney General will be reviewed for compliance with the minimum standards.

The Justice Department views this provision as an important means by which the views and concerns of State and nongovernmental persons may be incorporated into the Federal policy with regard to the proper procedures for handling prisoner complaints. Moreover, it provides the officials who develop acceptable grievance procedures with the protection that prisoners contemplating suit will first pursue prescribed remedies that may avoid the necessity for litigation. Prisoners would benefit from procedures that provide for the priority processing of grievances involving life-threatening situations, and from the increased possibility that their complaints would be resolved without protracted litigation. Finally, the provision would foster efficient judicial administration by encouraging effective grievance procedures that could eliminate the necessity for litigation in some instances. This potential benefit would be both administrative and financial.

I must register the Justice Department's opposition to the so-called legislative veto device found in section 4(a) of the bill. The Department has long believed that such devices are unconstitutional. We would be glad to work with the committee in eliminating this constitutional problem.

Mr. Chairman, the remainder of my testimony discusses in some detail the suggestion from the National Association of State Attorneys General of a Presidential Commission. I would prefer to make only three comments in that regard and ask that the full text of my statement on the idea of a commission be included in the record.

Mr. KASTENMEIER. Without objection, your request is granted.

Mr. DAYS. The first point I would like to make briefly is that the Justice Department has worked well in the past and will work in the future with State and local officials and with nongovernmental officials to establish standards in a variety of areas.

Second, a number of standards have already been promulgated with respect to institutions that would be covered by this legislation. As the subcommittee undoubtedly knows, the Department itself has been working on minimum standards of correction that would then be used by the Federal Bureau of Prisons to protect inmates incarcerated in institutions under the authority of the Attorney General and it is our

hope that those standards would be accepted by State and local governments as an amalgam of the best standards that have been promulgated heretofore.

Finally, I'd like to make the point that whatever process of consultation and development of standards occurs, it is truly unrelated to the purposes of this legislation. This legislation is about providing the Attorney General with litigating authority to deal with unconstitutional conditions of confinement and I frankly think it is not the role of a commission or a nonjudicial body to determine what the constitution says. That has traditionally been the role of the Federal courts in our system of government. The litigation authority that we would gain would not, of course, be in derrogation of whatever was established through a consultation process, but I would submit to the subcommittee that these procedures are really on separate tracks. They are related, but the progress of one is really not controlled by the progress of the other.

Mr. Chairman, I would like to say in closing that the Justice Department views this legislation as a vital step towards insuring that the Federal law enforcement agency will be able to enforce the laws protecting institutionalized persons with the same vigor and with the clear statutory authority under which we can now enforce our criminal, antitrust, tax, and other laws. The citizens we seek to protect through the litigation I have described this morning are in many ways the most vulnerable members of our society. They are our retarded children, our elderly. They are the men and women who, because they have violated our laws, must be confined in penal institutions. The circumstances that cause them to be institutionalized are in no instance a justification for the kinds of treatment we have documented time and time again through our investigations.

We view this legislation as an effort to insure that when we speak of the constitutional and statutory rights of our citizens we give that phrase a full and inclusive meaning.

I want to express appreciation for your many hours of work, Mr. Chairman, particularly, and your deep commitment to this legislation and pledge the continued cooperation of the Department of Justice in this effort. Thank you. At this time I would be happy to entertain any questions the subcommittee might have.

[Complete statement follows:]

STATEMENT OF DREW S. DAYS III, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

I am pleased to appear before the Subcommittee to testify on H.R. 10 which would clarify the authority of the Attorney General to intervene or initiate actions involving institutionalized persons.

The Department of Justice supports the provision of H.R. 10 which grants the Attorney General authority to institute civil actions in federal courts to redress deprivations of constitutional rights. I appeared before the Subcommittee on April 29, 1977 in support of H.R. 2439 which was introduced to accomplish that same purpose and later passed the House in amended form as H.R. 9400. I also testified on January 24 of this year before the Subcommittee on Child and Human Development of the Senate Committee on Human Resources, chaired by Senator Alan Cranston, on the subject of abuse of children in institutions. At that time, I suggested that this legislation, which would authorize the Attorney General to be an advocate for those least able to articulate and seek redress for dep-

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As I stated in my prior testimony, the Department of Justice has been involved in litigation involving the rights of institutionalized persons since 1971. Nearly all of that involvement has been through intervention or participation as litigating *amicus curiae* in on-going private litigation. Our experience in that litigation convinced us of two things: one, that the basic constitutional and federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis that federal involvement is warranted, and two, that the United States must have the clear authority to respond to serious deprivations of such rights which come to our attention, regardless of whether a suit has been filed by private parties.

In recognition of those needs we instituted, in 1976, three suits against institutions in which our investigations had produced evidence that unconstitutional conditions existed. Two of those suits concerned state institutions for mentally ill and mentally retarded citizens,[1] and the third involved a large county jail.[2] In all three of those cases, the district court dismissed our complaint on the basis that the United States does not have the right to bring suits to redress deprivations of the constitutional rights of institutionalized persons absent specific statutory authority.[3]

The *Solomon* decision which involves the Rosewood State Hospital in Maryland was affirmed by the court of appeals and the *Mattson* case, involving the Boulder River State Hospital in Montana has been argued and is pending before the court of appeals in the Ninth Circuit. Defendants have cited the decision in *Solomon* as authority for motions to dismiss the United States as plaintiff-intervenor in several cases. We have been successful in defeating most of those motions.[4] However, one district court has suggested that the United States lacks the requisite standing to intervene in an on-going private suit.[5]

Especially significant to the subcommittee's consideration of this legislation is the fact that district courts have continued to request the participation of the United States in institutions litigation, which I believe demonstrates a recognition by some courts of the significant contribution which we can bring to these suits based upon our fact-gathering capability and expertise acquired through our past experience in litigating these complex issues. For instance, the district court for the Western District of Kentucky requested our participation in a suit alleging unconstitutional conditions of confinement in the Eddyville State Penitentiary,[6] and the district court for the Western District of Texas ordered our participation in a suit challenging conditions of confinement for approximately 900 inmates residing in the Bexar County Jail.[7] The allegations in that suit include serious overcrowding, limitations on access to legal materials, and episodic outbursts of violence.

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[1] *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F. 2d 1121 (4th Cir. 1977); *United States* v. *Mattson*, No. CV74–138–BU (D. Mont.), appeal argued Nov. 8, 1978, No. 76–3568 (9th Cir.).

[2] *United States* v. *Elrod*, C. A. No. 76–C–4768 (N.D. Ill.)

[3] In *Elrod*, the court did not dismiss that portion of the suit which was brought to eliminate segregation of inmates. However, a motion to dismiss on the basis that the institution no longer receives federal financial assistance is pending.

[4] See *e.g.*, *Horacek and United States* v. *Exon*, C. A. No. 72–L–299 (E.D. Neb., Jan. 4, 1977); *Rone and United States* v. *Fireman*, C.A. No. 75–355A (N.D. Ohio, Dec. 29, 1977); *Garrity* v. *Thomson*, Civ. No. 78–116 (D. N.H., Nov. 29, 1978); *Adams* v. *Mathis*, Civ. No. 74–705 (M.D. Ala., Feb. 28, 1978); *Halderman* v. *Pennhurst*, Civ. No. 74–1345 (E.D. Pa., Nov. 30, 1976), appeals pending, Nos. 78–1490, 78–1564 and 78–1602 (3d Cir.).

[5] *Alexander* v. *Hall*, C.A. No. 72–209 (D. S.C., June 12, 1978). The court had held prior to *Solomon* that the United States had the authority to intervene because it had authority to initiate a separate suit.

[6] *Kendrick* v. *Carroll*, C.A. No. C–76–0079P(J) (W.D. Ky.).

[7] *Devonish* v. *Hauck*, C.A. No. 73–CA–59 (W.D. Tex.).

We are committed to continuing to participate in these kinds of cases where possible. However, this legislation proposed by H.R. 10 is important in at least two significant ways. First, it would provide the clear statutory authority which is necessary so that we can channel our legal resources into addressing the serious problems which we know exist in the kinds of institutions covered by the bill rather than in litigating questions concerning our authority to be in court. Second, the legislation would allow us to allocate our resources more effectively to pursue violations of constitutional rights where no private litigation has been brought.

CONDITIONS IN INSTITUTIONS

When I appeared before the Subcommittee approximately a year and a half ago, I described in great detail the conditions which have come to light in many of the cases in which we have been involved. Indeed, that testimony, along with the published record of the Senate hearings on S. 1393 in the summer of 1977 is full of factual accounts which provide support for the need for this legislation. I spoke then of life-threatening situations in prisons and mental health facilities in a number of different states such as physical abuse of residents and gross neglect of basic medical needs—conditions under which no person in the United States should be forced to exist.

Let me share with you some examples from a case which was decided in December 1977 by the court in the Eastern District of Pennsylvania concerning the Pennhurst State School and Hospital, a large residential institution for the mentally retarded.[8] I personally argued before a panel of the United States Court of Appeals for the Third Circuit on January 9th of this year that the evidence introduced at the thirty-two day trial amply supported the district court's findings of unconstitutional conditions of confinement.

The court found that physical restraints are used excessively because of staff shortages, and that these restraints are potentially physically harmful and have, in fact, caused injuries and at least one death. Dangerous psychotropic drugs are often used for control of patients and for the convenience of staff rather than for treatment or habilitative purposes. The side effects of such drugs, besides general lethargy, include hypersensitivity to sunlights, inability to maintain balance, and a gum condition marked by inflammation, bleeding and increased growth.

The court concluded that this large, isolated institution which had been in use since 1908 was an inappropriate and inadequate facility for the habilitation of retarded persons when judged in light of the presently accepted professional standards of care. I think it is significant to note the court's finding that although the state legislature had in November 1970 appropriated $21 million for the purpose of planning, designing and constructing community-based facilities which would enable 900 Pennhurst residents to be transferred to a more appropriate environment, seven years later only 37 residents had directly benefitted from the legislation. Equally significant is the court's finding that such community-based facilities are in the long run, less expensive to operate than large facilities such as Pennhurst.[9]

I was very pleased to note that the pre-intervention certification requirements contained in H.R. 9400 have been deleted from H.R. 10. We recommend that the Committee Report make clear that in the face of the statute's silence on the issue, the right to intervene would be left to the present state of the law. Our experience with cases in which we have intervened and others we have researched suggests that statutory authorization is not necessarily required for intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure, the provision on which we presently rely in most cases for intervention purposes.

PRESUIT REQUIREMENTS

We are all well aware that one of the most difficult aspects of determining the appropriate Federal role in addressing the care and treatment of persons in state institutions is the inherent balancing of competing state and federal responsibilities and authorities. Our Federal system and equity both demand that appropriate state officials have an adequate opportunity to correct alleged condi-

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[8] *Halderman v. Pennhurst*, C.A. No. 74-1345 (E.D. Pa., Dec. 23, 1977), appeal argued Jan. 9, 1979, Nos. 78-1490, 78-1564, 78-1602 (3d Cir.).

[9] Order of Dec. 23, 1977, pp. 41-42.

tions before they are named as defendants in a lawsuit instituted by the Federal law enforcement agency. For this reason, the Justice Department supports the inclusion of provisions such as those in H.R. 10 that require not only notice to appropriate state officials, but also the opportunity to correct the alleged conditions. I can assure you that if such legislation is enacted, the Department will take seriously its duty to comply with these provisions. Moreover, the Attorney General's authority to file suits such as those contemplated by this legislation must be tempered with a guarantee that the force of the Federal government will be reserved for those circumstances where the violations of rights are grave in nature and so extensive in scope that they suggest more than isolated instances of mistreatment or injustice.

SPECIAL REQUIREMENTS REGARDING PRISONERS

Our involvement in lawsuits on behalf of persons in correctional facilities has been a major component of our litigation on behalf of institutionalized persons. We are convinced that without our ability to be so involved many instances of the denial of prisoners' rights might go uncorrected because of the limited private resources available to undertake the investigations necessary for the successful prosecution of such suits. We support strongly the inclusion of prisoners among those on whose behalf the Attorney General will be explicitly authorized to sue.

We have some concern, however, that Section 2 of H.R. 10, while it authorizes the Attorney General to initiate litigation to vindicate "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" limits such lawsuits in the case of prisoners to circumstances where "such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States."

I note with approval that in H.R. 10 this limitation does not apply to juveniles awaiting trial or other pretrial detainees. However, we would prefer to have no such limitation at all on the Attorney General's authority with regard to suits on behalf of prisoners.

GRIEVANCE PROCEDURES

Section 4 of H.R. 10 requires that the Attorney General promulgate minimum standards relating to the development and implementation of a speedy and effective system for the resolution of prisoners' grievances. In that process he must consult with state and local agencies and persons and organizations with expertise in corrections. In addition, the standards must conform to certain minimum statntory requirements. Grievance resolution systems that are submitted to the Attorney General will be reviewed for compliance with the minimum standards.

The Justice Department views this provision as an important means by which the views and concerns of state and nongovernmental persons may be incorporated into the federal policy with regard to the proper procedures for handling prisoner complaints. Moreover, it provides the officials who develop acceptable grievance procedures with the protection that prisoners contemplating suit will first pursue prescribed remedies that may avoid the necessity for litigation. Prisoners would benefit from procedures that provide for the priority processing of grievances involving life-threatening situations, and from the increased possibility that their complaints wonid be resolved without protracted litigation. Finally, the provision would foster efficient judicial administration by encouraging effective grievance procedures that could eliminate the necessity for litigation in some instances. This potential benefit would be both administrative and financial.

I must register the Justice Department's opposition to the so-called legislative veto device found in Section 4(a) of the bill. The Department has long believed that such devices are unconstitutional. We would be glad to work with the Committee in eliminating this constitutional problem.

STUDY COMMISSION PROPOSAL

I also want to address the question of a Presidential Commission to study the issue of the care and treatment of institutionalized persons. The National Association of Attorneys General has solicited the Attorney General's comments on this concept. I would like to share with you the Department's views on this proposal as they were summarized in my Senate testimony.

At the outset I would like to stress that the Justice Department stands willing to engage in consultation with state officials whenever appropriate, whether to seek to avoid the necessity for litigation or to have the full benefit of their views on the proper standards for institutional care and treatments. It is also important to note that a study commission would not in any sense supplant the purposes of H.R. 10 and S. 10 or obviate the necessity for such legislation. These proposals are premised on the conviction that litigation is an appropriate and necessary means by which the rights of such persons may be vindicated and relevant statutes and constitutional provisions enforced. The legislation is not designed to address the wide range of very legitimate policy questions in this area. Its purpose is to facilitate and set guidelines for legal action when the Attorney General is able to certify that the state official involved are unable or unwilling to voluntarily redress alleged denials of the statutory or constitutional rights of persons confined in institutions.

The legislation limits the lawsuits which may be initiated to cases of grave violations of law which are systematic in nature. Some recent cases illustrate the kinds of circumstances when such litigation is vital to the protection or vindication of essential rights.

Battle v. *Anderson* involved confinement conditions in the Oklahoma prison system. The Justice Department's prefiling investigation show that there was racial segregation of inmates in housing, extensive overcrowding, inadequate medical care, and excessive violence and brutality by employees against inmates. The defendants were unwilling to concede that these problems rose to the level of a constitutional or statutory violation. In 1976 the United States District Court issued an opinion finding the conditions and practices complained of to be unconstitutional and directing the defendants to develop and implement plans to redress the violations. In 1978 a compliance hearing was held and the Court issued another decision finding that the conditions and practices originally condemned were still present and granting further relief.

In *Costello* v. *Wainwright*, a case involving inadequate medical and psychiatric care and the overcrowding of prisoners in the Florida system, the defendants, while acknowledging that there were problems in these areas, argued that they could not voluntarily resolve the issues because of inadequate financial resources. In 1975 the District Court issued a preliminary injunction that required the defendants to reduce the overcrowding. The defendants appealed on technical grounds and, despite the loss of the appeal, are still today in noncompliance with the preliminary injunction with regard to overcrowding.

In sum, state systems frequently are not capable of voluntarily correcting violations of Constitutional and statutory rights of institutionalized people because either they deny that there are violations, or, sometimes in addition they lack the resources or the will to correct violations. The judicial process serves to resolve any factual questions as to whether there are violations and in many instances expedites the provision of adequate resources to correct them. It seems to me that those who question the fundamental value of litigation in this area will inevitably question the value of a statute to facilitate litigation. But for those of us who have learned through extensive experience the need for such legal action, this legislation is tremendously important.

Having indicated what I consider to be a fundamental difference of viewpoint between the Justice Department and those who have proposed a Study Commission, I will comment on the Presidential Commission concept. The National Association of Attorneys General provided the Justice Department with a draft of their proposal to establish such a commission. It is their proposal on which my comments are based.

I understand the proposal to address an issue not directly with H.R. 10—the extent to which the care of institutionalized persons can and should be the subject of a coordinated and rationally developed set of national standards and policies. Contrary to the apparent assumption of the proposal's drafters, this question has not gone unaddressed.

The Department of Justice Task Force on Federal Standards for Corrections worked many months to develop draft standards that are responsive to the rights and needs of inmates in correctional facilities as well as to the requirements of institutional security and management. In the course of that process, the Task Force reviewed prior standard setting efforts of such organizations as the American Correctional Association, the American Medical Association, the American Bar Association and the National Sheriff's Association. The draft standards circulated widely last year by the Task Force reflected many of the

standards endorsed by these other groups. The Task Force has now received and compiled the many comments those draft standards generated. A drafting committee on the Task Force has undertaken a review of the standards in light of those comments at the same time the Task Force is engaged in a dialogue with the American Correctional Association so that the Justice Department and the ACA can seek mutual accommodation on issues on which each has developed standards.

The President's Commission on Mental Health, with the assistance of several hundred mental health and other professionals, developed last year a wide range of recommendations to improve the delivery of mental health care in this country.

These are two of the most recent forums which generated intense discussion of the issues most significant for the care and treatment of institutionalized persons. In both instances, the question of human and financial resources received a great deal of attention. The grievance procedure process I have already discussed would provide another opportunity for the Justice Department to work closely with state officials to develop mutually acceptable responses to the problems highlighted through these exchanges. We also note that both H.R. 10 and S. 10 would require pre-litigation consultation with state officials about assistance which may be available from the United States to assist in the voluntary correction of allegedly illegal or unconstitutional conditions.

Moreover, I question the implication that a Presidential Commission is the arena in which standards of a Constitutional dimension may be developed. While such a commission would undoubtedly engage in extensive discussion and investigation preparatory to the development of snch standards, the courts are and will remain the ultimate arbiters of what the Constitution requires. This fact is fundamental in evaluating the potential usefulness of the Commission.

Finally, there is the question of cost. In the face of my serious doubts about the need for such a Commission and what it could contribute to the effort to improve institutional care and treatment across the country, the fact that its proponents estimate such a Commission would cost several million dollars is an additional reason to oppose its creation.

For these several reasons the Justice Department opposes creation of a Presidential Study Commission.

Mr. Chairman, I would like to say in closing that the Justice Department views this legislation as a vital step towards ensuring that the Federal law enforcement agency will be able to enforce the laws protecting institutionalized persons with the same vigor and with the clear statutory authority nnder which we can now enforce our criminal, antitrust, tax and other laws. The citizens we seek to protect through the litigation I have described this morning are in many ways the most vulnerable members of our society. They are our retarded children, our elderly. They are the men and women who because they have violated our laws must be confined in penal institntions. The circumstances that caused them to be institutionalized are in no instance a jnstification for the kinds of mistreatment we have documented time and time again through our investigations. We view this legislation as an effort to ensure that when we speak of the Constitutional and statutory rights of our citizens. we give that phrase a full and inclusive meaning. I want to express appreciation for your many hours of work and your deep commitment to this legislation and pledge the continued cooperation of the Department of Justice in this effort.

Mr. KASTENMEIER. Thank you, Mr. Days, for that testimony. It's very helpful.

I have a number of questions. I have a couple of comments to make. but my questions I think I will defer until after my colleagues have had an opportunity to ask questions.

I certainly agree with you on the study commission. In another area we have had a devil of a time to get the President to create a copyright royalty tribunal which was very much a part of the original copyright law revision, and I have a feeling that any commission along this line the President is not asking for will be vetoed. I'm sure he would not be favorably disposed to it. That is simply not a realistic option.

Mr. DAYS. Mr. Chairman, let me add one other comment. I was just informed that the Attorney General signed a letter to the National Association of State Attorneys General this morning which indicates the Department's opposition to the idea of a commission. So that message is on its way formally and we will provide the subcommittee with a copy of that letter. [See app. 2, item 6.]

Mr. KASTENMEIER. I understand your testimony in terms of prisoners. You would prefer to have no limitation at all on the Attorney General's authority to the suits on behalf of prisoners and indeed in the markup that question will be raised along with at least one other suggestion that you made. However, you understand we included it in this text because the Ertel amendment as at least modified by the Railsback amendment did express the views of the House which we felt we ought to reflect. This view was that prisoners, while they would not be totally overlooked, would not enjoy quite the same breadth of protection with respect to enabling the Attorney General to initiate suits. We felt that limitation in terms of, shall I say, reflecting the attitude of the House and reflected by amendments on the point last year, was essential. However, that question will be raised in the markup and your point of view will be communicated.

Mr. DAYS. Mr. Chairman, on that point, one of the concerns that I have is with respect to authority that the Attorney General already possesses to deal with certain types of discrimination in public institutions under title 3 of the 1964 Civil Rights Act. Certainly segregation in public institutions can be dealt with already by the Attorney General. There's also authority, of course, under title 6 with respect to recipients of Federal funds and also under the revenue sharing act. It's my interpretation of those statutes that they really flow from a constitutional base and I would certainly like any report on this legislation to reflect the fact that that authority remains unmitigated and unaffected by H.R. 10.

Mr. KASTENMEIER. I appreciate that point and it's one well to make. I'm sure that we will want to take that into consideration.

At this point I would like to yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have no questions, Mr. Chairman. I came in a little late and, second, it's material we have covered before, so I'm just going to pass on the questions. Thank you.

Mr. KASTENMEIER. I would like to yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I have a few concerns about the legislation that perhaps you could help me with. I know that none of us want to see prisoners mistreated or anybody that's in custody mistreated. At the same time, there's a question as to who should set the standard that is to be present and what other mitigating circumstances should be considered.

If you have a prisoner that has endangered the life of other prisoners and perhaps killed some of them or is totally uncontrollable, who's going to set the standard of restraint that has to be applied to that prisoner? The Federal Government or the State that has him under control? If the jails are overcrowded and there isn't funds available to build a larger jail at a particular time, are the States going

to have to release prisoners that may be dangerous to the general public in order to avoid the kinds of difficulties they could come under with this kind of legislation? In other words, who's going to be the judge? Is it going to be the State officials who presumably want the same kind of things that a Federal official would want? They want the best standards that they can have but they want protection of those that remain and of the general public.

Mr. DAYS. Well, Mr. Moorhead, I think that this legislation contemplates that the judge will be the judge. In other words, the determination of whether there's been a violation of the Constitution or if there's a violation of the laws of the United States will be left to Federal judges and they, of course, have great expertise in this area and they have been designated under our system to make such determinations.

Certainly the U.S. Government can make an initial determination that it felt that there was an indication of a violation of the constitutional right of persons confined in penal institutions, but the ultimate determination would be made by the court and that's the type of procedure that we follow in many other areas of the Attorney General's authority.

Mr. MOORHEAD. But if that were the only thing that you were concerned with is the constitutional requirement, that's already present.

Mr. DAYS. Indeed, I don't understand this legislation to grant any additional rights to people who are confined in institutions. It simply provides standing to the Attorney General to bring these matters to the attention of courts.

Mr. MOORHEAD. All right. If you go beyond that, then with the prisoners that are—with the people who are mental health problems and other things of that sort?

Mr. DAYS. Yes.

Mr. MOORHEAD. Now, as far as those people are concerned, there's always a question of how much restraint is necessary for their own benefit, whether the doctor prescribed medicines in order to give them their own protection. The question there is then whether the State government should be the supervising authority or whether the Federal Government should be.

Mr. DAYS. Yes. In the cases we have been involved in, that has not ever to my knowledge been a question of considerations such as whether a patient should receive more or less medication. Where we have been involved, the treatment has risen to the level of gross malpractice and callous disregard for the welfare of people who have been confined in these institutions—treatment that violates all of our constitutional expectations.

Mr. MOORHEAD. How general is this kind of behavior across the country? Is it true in all States, or is it true in only a very few?

Mr. DAYS. Well, I'm not in a position to speak with respect to the entire United States, but when I testified in 1977 about this problem, we had experience with about 12 different States where we had found such problems and we have become involved in litigation in other States.

I think one of the reasons why this legislation is important is that, as I suggested in my testimony, we are not talking about an isolated

problem. This is a problem that really is of a magnitude to deserve the attention of the Federal Government and the Attorney General. I'm not saying that in every institution in the country such problems exist. There are some institutions where prisoners are in fact being provided adequate treatment, where the mentally retarded are being given habilitation; and what, of course, have been trying to do is encourage the development of such circumstances in other places.

Mr. MOORHEAD. Is it contemplated that the Federal Government would come up with the additional money necessary to bring these institutions up to that standard?

Mr. DAYS. Well, I think that certainly the legislation contemplates that the Attorney General will act as a partner of the State or local officials in trying to identify what Federal funds or other types of technical assistance are available to deal with the problems that have been identified.

Certainly in the last resort it is the Congress that can determine how much money will be set aside to deal with problems that we identify in our investigations and our litigation, but certainly we would encourage that. It's my view that the Federal Government really should be providing as much support as it can, but there is support going to some of these institutions. The Pennhurst Hospital, the institution I talked about earlier, was an example of a place where Federal funds were being provided, but I think the record reflects they were not being used for appropriate purposes. They were being put to purposes that were contrary to the intent of Congress and certainly the intent of HEW.

Mr. MOORHEAD. I know this is an area that we are all concerned with; especially I have been concerned with those people that are incarcerated that shouldn't be incarcerated because of alleged mental health problems. I practice law many years and I have seen instances where people were incarcerated that shouldn't have been, and our own State of California has done an awful lot to try to get people back out on the street as soon as they possibly could be and under outpatient care so that they wouldn't be held in these institutions.

But it is vital that those—where there is the money that's necessary that they don't be held at such a standard that they get nothing instead of something that's reasonable, and I'm somewhat concerned about the Federal Government having the final decision rather than the States, which I assume have the same degree of desire to work for good in these areas.

Mr. DAYS. Well, Mr. Moorhead, there is a flip side of that concern, if I may characterize it in that way. It's my understanding that Attorney General Levi was supportive of legislation of this kind because he identified, as have many other people, the pressure upon courts not to commit persons to institutions where judges know of the unconstitutional conditions in those institutions. So the pressure is to find some way of keeping those people out of institutions even though otherwise they should have been committed, people who have certain violent tendencies, but judges have said publicly in many instances, "I cannot send a person to that hellhole and I've got to figure out a better way of dealing with it." So it creates an unnatural tension within the criminal justice system that ought not to exist.

Mr. MOORHEAD. The last time the bill came up there was considerable debate about actually what constituted State action and what areas should be covered and shouldn't be covered by the bill, and we heard people speaking on the bill that took one side and others that took another, that they really didn't know what this bill was intended to do, and I'd like to ask you a couple questions, maybe three or four, that would show where you think the line is drawn.

Is a purely private nursing home, even though it may be the worst nursing home in the country, covered by this legislation?

Mr. DAYS. I would think not.

Mr. MOORHEAD. How much involvement with the State does it take to bring a nursing home under the act?

Mr. DAYS. Now we get into a difficult area and all I can say, Mr. Moorhead, is that the most effective way of dealing with the question of that kind is looking to the state of the case law on State action. Of course, the Supreme Court has decided a number of cases, all of which seem to point to the need for more than a passing relationship between the State and an otherwise private institution before the 14th amendment principles come into play. There has to be an interaction, a partnership, a kind of cooperative effort going on between the State and an otherwise private institution to establish State action. Mere licensing, for example, would not constitute State action, and there have been other cases that I think have indicated the Supreme Court's unwillingness to say that everything is State action because, of course, government has some involvement with every feature of our life.

Mr. MOORHEAD. Would the mere receipt of State or Federal money and nothing more bring a nursing home under this legislation?

Mr. DAYS. I think it would depend upon the nature of the relationship. For example, if we are referring to this present draft of the bill, Federal funds or State funds are provided to institutions for the mentally ill or retarded, for certain purposes, and that would perhaps trigger a determination there had been State action by the granting governments. I'm not certain that there would automatically be a determination that State action was present. One would have to look at it. I think the state of the law is such that a case-by-case analysis is really necessary.

Mr. MOORHEAD. How about a situation where there was a contract between the private nursing home and the State or Federal Government that related only to money? Would that bring it under the legislation?

Mr. DAYS. I think that one would be moving very close to the State action line. I think where an otherwise private institution is carrying out a public function—and that's usually the consequence of contractual relations—then I think there would be a strong indication that State action was present.

Mr. MOORHEAD. In that area there's still a little doubt?

Mr. DAYS. Yes. As I was trying to indicate, it is very difficult to generalize in this area. The Supreme Court has never established hard-and-fast rules. It simply established a set of criteria that one can use.

Mr. MOORHEAD. Let's take it just a step further, then—where there's a contract between a private nursing home and a State for the care of persons but the State has some responsibility.

Mr. DAYS. Well, maybe I was anticipating that step because I think that's clearly State action.

Mr. KASTENMEIER. If my colleague would yield, of course, in the first instance that's governed by the language in the proposed bill; that is, the statute explicitly provides "which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with any State or political subdivision of the State," and so forth. Now, granted that does not solve the problem entirely.

Mr. MOORHEAD. There are vague areas within that definition, however.

We have already covered the Senate license which you said the answer to that would be no, but with State regulations or tax exemptions or Federal money, they would not singularly or collectively be adequate for involvement with the State. Would these collectively be enough to bring them under it? From what you said, probably so.

Mr. DAYS. It would depend. One would have to look at the interaction of those various controls.

Mr. MOORHEAD. There was just one other question. I think you have answered this. Is it the intent of the drafters of this legislation to apply the racial discrimination standard to these cases?

Mr. DAYS. Do you mean the strict scrutiny—compelling interest test? I don't believe so.

Mr. MOORHEAD. I have no further questions.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. I'm concerned, first, with respect to what I would call the four classifications of disabled persons who are generally treated by the States—the retarded child, for example, to begin with. One of the saddest experiences I know of is to represent a family with a retarded child living in a state which does not provide services for that child. Is there any thought given to what might be the impact of this legislation with respect to States which are now providing care for retarded children which might retreat from continuing to provide that care?

Mr. DAYS. It's certainly something we should give thought to, but I find it difficult to generalize. I think in those States where the people have decided that treating and caring for the mentally retarded is an important feature of that State's life, that the attorney general having the authority to sue to vindicate the righs of the mentally retarded, where they are being subjected to unconstitutional conditions of confinement, would not have a chilling effect. In fact, it might spur the States to provide even better treatment for those people.

Mr. GUDGER. A second and parallel problem—you suggest here that the Attorney General would not act in this situation as distinguished from the prison confinement situation unless these conditions are likely to cause grievous harm or deprive the inmate of constitutional rights exists pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.

When applied to the retarded child situation, do you perceive that as long as the institution is providing basic care and has adequate sanitation, health and medical supervision, that there would be any justification for intervention?

Mr. DAYS. Well, giving a full sense to the words you used, no, I would not see any basis for the Federal Government's involvement.

Mr. GUDGER. Even though the children, because of the nature of their handicap, might require physical restraint from time to time and that sort of thing?

Mr. DAYS. Even though that were present, I think one would have to determine whether they were indeed receiving treatment. That's been one of the important considerations in this litigation.

Mr. GUDGER. All right. Now let's get over to the situation where we're still dealing with the child mental health care and the children now are of an older age and do not have the same patterns of retardation that I was referring to earlier but perhaps have a clear history of violence and that sort of thing and the medical staff prescribes the use of shock therapy, prefrontal lobotomy, and this sort of thing. Do you perceive that the Attorney General could act with respect to what is to be the pattern of mental care directed by the institution?

Mr. DAYS. I think that the Attorney General might have a role to play under circumstances of the kind that you just described.

Mr. GUDGER. Certainly in the prefrontal lobotomy case where permanent impairment would ensue and this being a practice now which is somewhat passé?

Mr. DAYS. Well, I think it just comes down to the point that medical determinations cannot be totally free from judicial review and where there's an indication that certain practices are being carried out that have no apparent justification under the state of medical knowledge or given the conditions of the people involved, then I think there would be a role for the Attorney General to play.

As I described in my testimony, I suppose there are some people who would assert that using psychotropic drugs for custodial purposes is a practice that should not be subjected to any kind of court scrutiny. We disagree with that. We have seen serious harm caused to people in institutions as a result of that. These drugs are not to be used for custodial purposes. They are to be used in instances where they perform a medical function, keeping people from hurting themselves or other people, not so they are in some semi-comatose state for days at a time because of the inadequacy of the staffing.

Mr. GUDGER. Let's go a step further into adulthood in the mental health institution for adults. I come from a State which, shortly before leaving, its general assembly adopted what we called a bill of rights for mental patients, giving them the right to counsel of course, unrestricted communication with family, relatives, friends, and counseling to be available to those who perhaps required assistance and were not able to find it from the family unit.

Now would you perceive that the Attorney General would be reviewing the practices of a State which gave that sort of right to its mental institution patients, even to the point of allowing very short notice review and a right to withdraw from the institution under certain circumstances where there was suspicion of the impropriety of care?

Mr. DAYS. My answer is yes. It would depend upon the factual showing. For example, in the *Pennhurst* case, it was technically possible for persons over the age of 18 who were involuntarily committed to ask to be released, but in fact that never took place because they were

not in a position to really take advantage of that so-called right. Once they were committed, they remained in that institution for the rest of their lives unless some third party came forth.

Now these procedural protections are important but they are not necessarily the answer to problems that exist with respect to conditions in some of these institutions.

Mr. GUDGER. One further question with respect to this dilemma that Congressman Moorhead addressed of the State which has had a great growth in prison population to a point where its trial judges are not committing third and fourth offenders to detention and yet there is egregious housing creating unhealthy and dangerous conditions. Many States are experiencing this right now.

Your pattern of action on the part of the Attorney General suggests that he must notify the chief executive, the attorney general of the State whose policies are criticized, and be satisfied that the appropriate official had had a reasonable time to take appropriate action to correct.

Now what would be a reasonable time to take appropriate action to correct a situation where you have 15,000 inmates in a plant built to accommodate 10,000?

Mr. DAYS. Well, the "reasonable" would have to be defined in terms of the specific conditions identified. If we're talking about overcrowding, then I think "reasonable" would involve a longer time than where we were concerned with the provision of certain types of medical treatment. If the question were whether diabetic inmates should receive insulin we could say "reasonable" is tomorrow.

Mr. GUDGER. May I address another question by way of further definition of that problem? Where the legislature has appropriated funds and construction is underway and being brought online as fast as possible apparently to try to meet this swelling prison population condition, would you consider that as one of the criteria even though it might take 2 years to implement?

Mr. DAYS. Absolutely, but I would have to say that where we had identified life-threatening situations there would have to be some immediate addressing of such problems, but in terms of the overall questions of overcrowding and placement of inmates, certainly that could await a period of time to complete construction.

Mr. GUDGER. You're conceiving of the Attorney General acting in a responsible, negotiating capacity with the State authorities?

Mr. DAYS. Yes; and I understand that's what this legislation is designed to underscore.

Mr. GUDGER. Yet the legislation, in a sense, presupposes that the States are willfully depriving inmates of mental institutions and other institutions of human rights guaranteed by the Constitution.

Mr. DAYS. Well, when you say "willful"—I think the legislation really is concerned with the reasonable and likely consequences of certain types of official action in these institutions, not necessarily malice aforethought.

Mr. GUDGER. I will rephrase that to knowingly.

Mr. DAYS. Yes.

Mr. GUDGER. Thank you. No further questions.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

I'm a little concerned with the general thrust of this bill, on the kind of philosophy that some way or other the Federal Government and the Department of Justice is more interested or more concerned than are the State governments and the local governments, and putting them in kind of a position of sort of superintending control, if you will, over those agencies. I am particularly concerned when you get down to the specification of the grievance procedures.

When the act covers correctional facilities, pretrial detention areas and so forth, does that include juvenile facilities or do you understand it to?

Mr. DAYS. Yes; it does.

Mr. SAWYER. So that they would——

Mr. DAYS. It is not clear in the language, but I would assume that it also includes juvenile facilities.

Mr. SAWYER. As I understand it, you cannot under this act, as I read it at least—it does not really authorize the Department of Justice or the Federal Government to impose mandatorily any type of grievance procedure on the States or on any of its facilities; is that correct?

Mr. DAYS. That's correct.

Mr. SAWYER. It merely provides a stay or a delay in connection with Federal courts handling 1983 petitions?

Mr. DAYS. That's correct.

Mr. SAWYER. And there in that section it specifies only in connection with adult—it uses the word "adult," and I'm not quite clear why in that exemption part or the activating of the promulgated grievance procedures it isolates adults.

Mr. DAYS. You're absolutely correct. It is explicit there, but not in other places, and I think it would be up to the Congress to determine exactly what that provision's scope should be.

Mr. KASTENMEIER. If the gentleman from Michigan will yield, counsel reminds me that that language was in response particularly to Mr. Railsback's concern for juveniles; namely, that children or juveniles should not be required to exhaust such remedies, but adult prisoners should. He distinguished between the two and that is reflected in subsection C of section 4.

Mr. SAWYER. Well, it so happens, when I read this bill, I interpreted the insertion of "adult" there to in effect clarify the somewhat vagueness of the use of the terms "correctional facilities and pretrial detention facilities" and so forth, which do not in some thinking include juveniles and does not specifically—is indicating that the intent of the whole thing was to exclude juveniles.

Mr. DAYS. Well, as the chairman has explicated it, it certainly is consistent with the feeling of the Department that juveniles are within that group of persons deserving the special protection. They are the ones who would not be able ordinarily to take advantage of these types of grievance mechanisms.

Mr. SAWYER. Well, as I understand it then, if the grievance mechanism or promulgation mechanism is designed to apply to juvenile facilities also, then it's strictly optional on the part of the State or any authority whether they pay any attention to them or not.

Mr. DAYS. Tha's right. It wouldn't have any operative effect in the 1983 action.

Mr. SAWYER. And it would have no operative effect anywhere else then, as far as I understand, or do I misunderstand?

Mr. DAYS. I would think so, yes. I think that's correct.

Mr. SAWYER. Because other than its operative effect related to 1983 actions, it would be just as though the Attorney General now promulgated a set of grievance standards and circulated them. People could ignore them or do what they wish. Is this correct, except for the operative section under the 1983 action?

Mr. DAYS. That appears to be correct, Mr. Sawyer.

Mr. KASTENMEIER. May I say, if my colleague will yield, the Assistant Attorney General, Mr. Days, is correct. We intended to include juveniles in section 4(a) in terms of the promulgating of these standards but, the whole section is voluntary as far as the State is concerned. It may be in the State's interest that prisoners exhaust State grievance mechanisms. That is the theory and it would be consistent with the fact that very often resorting to 1983 petitions is not an effectual way to pursue some of these grievances anyway. However, in subsection (c) we did not want to say to juveniles that they must in fact exhaust State grievance mechanisms in order to avail themselves of immediate resort to 1983 action. We felt they should be specially protected. That was the reason we referred to adult offenders in that instance. But you're correct, the entire section is voluntary and no State need adopt these rules or standards. We hope there is some inducement to do so in the desire to require prisoners to exhaust local and State grievance mechanisms before resorting to 1983 in fact, and that's really what it's all about.

Mr. SAWYER. If I may say, Mr. Chairman, I'm a little at a loss to see the rationale of why—if we have such promulgated grievance procedures, why juveniles ought not to proceed through them any differently than anybody else ought to proceed through them. They are designed to accomplish a purpose, but beyond that, when you use the word "adult" in the operative section let's call it, do you include those who are under 18 years of age that may be in State correctional institutions? For example, in my State, 17 years of age is the age of adult responsibility. Now if you're incarcerated as an adult, are you then an adult as you understand it within the operative section?

Mr. DAYS. I would have to say yes, but it's not clear from the bill itself.

Mr. SAWYER. And under our State law also the probate court, which is our juvenile probate court, can waive jurisdiction down to people I think over 15 years of age if they feel the matter is of sufficient severity or concern—can waive jurisdiction so that somebody 15 years of age or older can be tried as an adult and incarcerated as an adult, and I just again—it's just an extension of the prior question——

Mr. DAYS. Mr. Sawyer, I don't think, however, that the use of the term "adult" without definition is unusual in Federal legislation. There's been a tendency to simply look to the jurisdiction involved for an appropriate definition of adult. Certainly I don't think the legislation would want to be in contravention unless there was some explicit concern about State law in that regard.

Mr. SAWYER. Do you, yourself, see any rationale for differentiating under the operative section between juveniles and so-called adults?

Mr. DAYS. Yes; I do.

Mr. SAWYER. What is it?

Mr. DAYS. Of course, we are speaking in gross generalities. One generality is that juveniles are probably not in a good position to protect their interests. Those who are institutionalized and prisoners are generally in a position to protect their interests. But I think in comparing the two groups we can say that juveniles have less access to the outside, have less understanding of procedures, have probably not been through the criminal justice system very often, are in fact supposedly receiving treatment. That's one of the concepts of the parens patriae doctrine, that the State is not supposed to be punishing juvenile criminals but giving them treatment and providing them treatment and direction so they can move into adulthood as law-abiding citizens. So I think in that regard they are quite different.

Mr. SAWYER. Well, of course, we have to presume that they are sufficiently sophisticated or apprized of their rights to file a 1983 action in a Federal court before the operative section even applies in any case; is that correct? Why would it be unreasonable to think they were unsophisticated enough to use the internal grievance procedure any more than an adult?

Mr. DAYS. I think the more meaningful distinction is the one I made about treatment as opposed to penalty or punishment.

Mr. SAWYER. Why would that be a ground for not using grievance or internal complaint procedure to get it corrected, whatever might be the problem, whether it results in miscare or misdetention?

Mr. DAYS. Well, there is no clear, bright line that logically separates one group from the other. I suppose one could assert that the retarded and the mentally ill could get outside assistance of some kind and those guardians could exhaust administrative remedies, but I understood this provision to be specifically directed to the allegedly large numbers of 1983 actions filed in Federal court raising frivolous issues or issues that did not amount to patterns or practices of violations of constitutional rights. So it was directed to a specific problem. It was not developed in some platonic way, if you will, based upon logical nicety.

Mr. SAWYER. I understand the purpose of it and I'm not unsympathetic to the purpose. I just, again—you realize that before the operative section has anything to operate on you have to have a 1983 action filed in the Federal court.

Mr. DAYS. Yes.

Mr. SAWYER. So it presupposes either some sophistication or some outside counseling or assistance for the inmate, and so I just wondered if there was any logical reason why, if it's a minor matter or the kind of matters that were called to the attention—these presumably might well be corrected by the detaining authorities—why juveniles ought not to do that too.

Mr. DAYS. There have not been very many lawsuits filed on behalf of juveniles and that may reflect that the States are more sensitive to their rights than they are to the rights of prisoners. They have in fact developed mechanisms to deal with these problems. If I remember correctly, in the report on H.R. 9400, there's a reference to a California Youth Act that in fact contains provisions of this type to deal with the problems of juveniles.

Mr. SAWYER. I see. Thank you. I have no further questions, Mr. Chairman.

Mr. KASTENMEIER. I have a couple of questions. If I may comment on the last exchange, I think it was very useful. In fact, I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in section 4 was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of section 4, that it should also extend to juveniles was rejected.

The gentleman from Illinois, Mr. Railsback, I think was largely responsible for that because it was felt that, as the witness has suggested, there are not only fewer cases but probably juveniles—as with juveniles generally, whether in a corrections system or in everyday life—are not the equivalent of adults in coping with their problems. Therefore when a juvenile does access himself of section 1983 perhaps the court ought to look at that seriously and not divert that case back to the grievance mechanism. That was generally the rationalization which gave rise to the present formulation of section 4.

Mr. SAWYER. Mr. Chairman, if I may just comment, while I did not sit on this subcommittee, I did have an opportunity to look at this bill in full committee and thought about it a little bit and, of course, it strikes me that the necessity of running a grievance procedure gamut in effect before you get the case into court had, in my view, a double entendre and a double benefit perhaps in that, as we all know, today the Federal district courts, with all due respect, give rather short shrift to these 1983 things. They are 1983 actions. They are complaining about everything from the fact their eggs weren't well cooked for breakfast on up and down the line, and I'm sure that it would be a benefit to the legitimate 1983 applicant in that the Federal court will probably pay more attention to those that are filed and give more consideration to them based on the fact that hopefully at that point they will involve more legitimate questions that the court ought to take a look at.

So I question whether if you don't apply that same standard to juveniles that juvenile complaints may continue to be treated in the Federal courts with a somewhat less than due deliberation and hopefully this will be the result in those surviving actions under 1983. Thank you. That's all I have.

Mr. KASTENMEIER. Mr. Days, we saw this legislation almost enacted last year and there was some opposition, particularly in the Senate, but even in some debate in the House which I think perhaps misunderstood what was contemplated by the Justice Department in terms of scope as far as the targeted effort that would ensue and how many suits would take place.

I think it would be useful if you would very briefly review, in the event of enactment, what change would take place in the litigative effort of the Justice Department. What is contemplated that is not available now in the Justice Department?

Mr. DAYS. Well, Mr. Chairman, at the present time we have a special litigation section which is responsible for our institutions' litigation and it presently has a staffing of 30 people, 18 attorneys, and the others are professional and clerical personnel.

It would be our expectation that with the enactment of this legislation that we would not increase appreciably the number of suits that we have been involving ourselves in. It would simply produce a different focus to our litigation. We would not have to spend long periods of time litigating over questions of standing, of jurisdiction, which we now do to a significant degree.

There would be, we think it reasonable to expect, some need for additional staffing, but very minimal, to deal with the whole question of the certification process; that is, establishing certain standards and then trying to determine the extent to which States had developed those standards and then making certifications.

But in terms of the litigation effort, we would not expect any need for significantly increased resources.

Mr. KASTENMEIER. In that connection, would you be more explicit with respect to what new costs to the taxpayers of the United States would incur or be required due to this legislation, what additional funding?

Mr. DAYS. Well, there was a submission made to the Congress with respect to H.R. 9400 that talked in terms of the increase.

Mr. KASTENMEIER. $76,000?

Mr. DAYS. That's right.

Mr. KASTENMEIER. Is that still a viable figure?

Mr. DAYS. Well, I think although the President wouldn't want me to do this, I would have to take into consideration inflation since the time we spoke, and I think there would be some need to recalculate, but we would not be talking about any difference in kind insofar as our expenses are concerned. We talked about $76,000 in fiscal year 1979 and then in fiscal year 1980 we would be talking about $81,000 and I simply——

Mr. KASTENMEIER. So you would not be contemplating a whole new burgeoning bureaucracy?

Mr. SAWYER. Not more than 7 percent.

Mr. DAYS. Absolutely not.

Mr. KASTENMEIER. Presently, what resources and what expertise does the Department of Justice bring to this type of litigation?

Mr. DAYS. Well, in the first instance, we have the use of the Federal Bureau of Investigation to conduct inquiries as to conditions in various institutions. Often this is a complex task and the FBI has demonstrated its great ability in that regard.

In addition, we have been able to use experts from other agencies within the Justice Department and outside the Justice Department, experts from the Federal Bureau of Prisons, from the Law Enforcement Assistance Administration, from HEW, and we can provide these experts to the court at far less expense to the taxpayer than could private litigants, for example.

We also have the assistance of experts from the District of Columbia Government who are nationally recognized in the field of institutional conditions and, of course, our lawyers have developed a great expertise as well in first identifying whether there is a problem, and second, being able to present that problem in a clear and concise fashion to the court, and third, assisting the court in identi-

fying what might be realistic remedies for the problems that have been identified.

That might sound like A-B-C to any lawyer who has done his or her homework, but I think it's fair to say that many Federal judges have found that because of the complex nature of this litigation most lawyers are not able to put on that type of case. They are not able to bring to the court a full sense of what's going on and what needs to be accomplished, and that's why courts have called us in on a number of occasions so that we can provide that type of focus.

Mr. KASTENMEIER. Now getting at what the Department of Justice recommends, there is no reference in this particular bill of authority to intervene. Would you review for us what led to that particular request, as to why that decision was made or what problem particularly was entailed by the prior language that was in the bill and what sort of legislative history you would recommend on that point?

Mr. DAYS. We have difficulty with the preintervention procedures in the earlier bill, primarily because we felt that such requirements would not advance litigation. They would prolong litigation and unduly complicate the resolution of cases that were already before the court. There were not only these logistical problems, but we saw some serious ethical problems with respect to the Federal Government's going into someone else's lawsuit and suggesting to the defendant terms for settlement.

I think that certainly has not been the contemplation of courts that have asked us to come into these lawsuits. They have envisioned the Justice Department working with the already existing parties to resolve the litigation.

We also think that there's sufficient law to determine the appropriate circumstances under which intervention could take place on the part of the United States. We have generally intervened under the permissive intervention procedures of rule 24 of the Federal Rules of Civil Procedure and have been able to meet the burden of showing that there was an interest on the part of the United States and that it could assist the court in carrying out its responsibilities in these cases.

Mr. KASTENMEIER. Are there any preintervention requirements you could live with? I certainly understand your concern with respect to the rights of the primary plaintiff. If we're talking about intervention, we're talking about persons or parties already in the litigation and there's been some discussion about affecting their rights to conclude their own suit on the best terms they can.

Are there any sort of restrictions, however, you would be prepared to live with in context of these primary plaintiffs?

Mr. DAYS. In terms of preintervention?

Mr. KASTENMEIER. Yes.

Mr. DAYS. Well, perhaps one of the things that we would be able to do without violating some of the considerations that I mentioned earlier is to provide a notice prior to intervention of exactly what we think the problems are and what we think the solution or the remedy should be. We do that in other instances. We send a notice letter that says we have conducted an investigation and we think that there are the following violations and the following remedies would meet what we understand the law to require. But that would not be an offer to sit down and negotiate. It would simply provide the State or local

officials with a sense of what our concerns are so they would not be unduly surprised when we intervened in the case. But I think our complainant intervention would be perhaps the best evidence of what we thought was wrong in an institution and what we thought would be appropriate remedies.

So I think that there is this prenotification that could take place so that a Governor or attorney general wouldn't have to read in the newspapers about a decision on the part of the Attorney General to intervene, and we have done that, I might add, prior to our consideration of this legislation.

Mr. KASTENMEIER. Now to review, in the past, of course, we know you have had difficulty in terms of initiating a suit as a primary plaintiff. Have you had any difficulty with maintaining plaintiff-intervenor status?

Mr. DAYS. No, it is not solely a question of initiating suits. After the *Solomon* decision was issued by the Fourth Circuit Court of Appeals, we were dismissed from a lawsuit in South Carolina on the grounds that *Solomon* prevented our even acting as intervenors in that case and, of course, a case against the Texas prison system, *Ruiz* v. *Estelle*, went up to the Supreme Court on a procedural question, a limited question; but there was some expression indicated in that instance by certain Justices of the Supreme Court as to whether there was in fact the right on the part of the United States to intervene in such cases. So it continues to be an open question.

Mr. KASTENMEIER. Well, the reason I raised the question is that our silence in this statute on the issue may be interpreted. As a matter of public policy, we enable you to initiate a suit quite clearly. Therefore, all the substates of intervention and litigating would be tacitly, if not expressly, approved.

Mr. DAYS. Yes.

Mr. KASTENMEIER. Therefore, would the status of being able to initiate suits in and of itself give status for any other purpose such as plaintiff-intervenor without explicit mention?

Mr. DAYS. The logic of the court's decision in *Alexander* was if the United States can't initiate suit, then certainly it can't intervene. One would argue that if we were authorized to initiate suit, then intervention would follow.

Mr. KASTENMEIER. My last question to you is important. What steps is the Department taking to insure that Federal institutions are meeting the constitutional requirements?

Mr. DAYS. Well, as I indicated, Mr. Chairman, we have been at work on standards for corrections which would apply to the Federal Bureau of Prisons. It's an effort that has involved all segments of the Department, not just the Bureau of Prisons, but the Criminal Division, the Civil Rights Division, Law Enforcement Assistance Administration; and what we are doing—and I think we have great confidence in the process we are following—is drawing from the best there is in terms of standards of corrections and trying to establish the U.S. Government as really a symbol of what ought to be done in institutions of this kind and then we would like to think that the standards would speak for themselves in terms of States and localities, and that they would be adopted by those governmental units.

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We feel very strongly the need to communicate clearly that we believe in one standard of conduct, that we don't believe in one standard for States and localities and another standard, a lesser standard, for the Federal Government. So we are working very hard in that regard.

We received comments from a number of governmental and private agencies and only last week, on February 8, the working group met again to digest some of those comments and prepare a final recommendation to the Attorney General. And I know I can speak for Judge Bell in saying that he feels very strongly that these standards ought to be promulgated as soon as possible to demonstrate, as I indicated earlier, that we believe in one standard.

Mr. KASTENMEIER. Is it conceivable that the U.S. Government would operate an institution—of course, the Bureau of Prisons is in the Department of Justice of which you're a part—let's say an HEW institution for the mentally ill, of which there would be a pattern or practice of complaints and the bureau or agency was not responsive. Is it conceivable that one agency of the Federal Government could proceed against another?

Mr. DAYS. I believe it's conceivable and there is some discussion about the Environmental Protection Agency's having that authority. I'm not really up to date on the status of that. It does pose some very perplexing constitutional questions, separation of powers questions.

Mr. KASTENMEIER. Thank you. That's all the questions I have.

Mr. DANIELSON. I have one more.

Mr. KASTENMEIER. I would like to yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman. In your questions, Mr. Chairman, you brought out right near the end and the witness referred to standards which are under consideration and hopefully will be promulgated shortly which apply, among others, at least to correctional and detention centers. Is that not correct?

Mr. DAYS. Yes.

Mr. DANIELSON. What's the status of those standards? Are they in draft form or final draft or where are they?

Mr. DAYS. Well, they were in draft form quite a few months ago and then they were widely circulated for comments and we have received all of those comments, numbering in the hundreds, and they have been analyzed. They have now been tabulated and the process is at the point of incorporating those various suggestions where they appear to be appropriate into the final draft that will be sent to the Attorney General for his review with recommendations from the task force.

Mr. DANIELSON. What would be your guesstimate as to when they will be promulgated?

Mr. DAYS. I can't say with any accuracy and I guess that's what a guesstimate is about, but I would think within the next few months.

Mr. DANIELSON. Now what types of institutions would these apply to?

Mr. DAYS. Well, the Federal Government, of course, runs everything from halfway houses and pretrial detention facilities up to maximum correctional institutions such as Marion, Ill.

Mr. DANIELSON. I would assume, then, these standards would probably apply to a detention facility, a jail which is locally owned and operated but utilized under contract to house Federal prisoners.

Mr. DAYS. Yes; I think that's a fair statement. Of course, we have been dealing with that problem already and in some instances Federal prisoners have been withdrawn from local jails because of the conditions in those institutions, and those decisions were made in conjunction with the Civil Rights Division. We found conditions in certain institutions and brought those conditions to the attention of the Director of the Federal Bureau of Prisons and inmates were in fact withdrawn.

Mr. DANIELSON. I have in mind a specific situation and maybe you're aware of it. I'm from southern California. I live in Los Angeles County. Our Federal prisoners there—that is, presentencing prisoners are housed in the local county jail. The county jail is grossly overcrowded. I think that's a conservative statement. Not that the sheriff doesn't want to run it well, but we have got more people than there are square feet. The U.S. District Court in Los Angeles a few months ago issued a decision, after a rather long hearing, that the situation had reached the point where it was constitutionally unacceptable, too much crowding and not enough time to eat, for example, and not enough chances to take a bath in a week, etcetera. There's a long list of problems.

Obviously, these things can't be corrected overnight because they require expanding facilities one place or another. Are you aware of that decision of the court in Los Angeles? Has this been brought to your attention?

Mr. DAYS. I must say I'm not familiar with it, but I should be.

Mr. DANIELSON. I think I'll take the liberty of sending you a copy.

Mr. DAYS. I'd appreciate that.

Mr. DANIELSON. I have it in my office and I'll see that you get a copy, if that's OK.

Mr. DAYS. Thank you.

Mr. DANIELSON. But these standards that you're talking about would apply to a situation such as the one I have just described?

Mr. DAYS. Yes; that's our contemplation, because there are already contractual relations between the Justice Department and many of these local facilities and we certainly couldn't subject Federal detainees to any worse conditions than would be available for them in Federal institutions.

Mr. DANIELSON. I don't have any specific questions here except I'm glad your're getting these standards. I hope you will put me on the list so when they are promulgated I can have a copy. I'm not planning to run an institution, but I would like to know what the standards will be.

Mr. DAYS. We will make certain that all subcommittee members receive copies.

Mr. DANIELSON. The gentleman from North Carolina.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. Mr. Chairman, I do have one more question and before undertaking that I want to thank Mr. Days for his testimony. It's been very, very helpful to me. I have had some reservations about this bill in the past and I'm seeing many of those reservations resolved here today.

One point I did want to address. In 1975 the North Carolina General Assembly adopted a grievance procedure, an administrative grievance procedure, with the help I believe of the Attorney General. This became law largely I would say because of the request of the Federal courts and also, of course, the State courts that we adopt a process whereby our Federal courts would not be deluged with these 1983 petitions. Now we feel that our State is in full compliance, having gotten counsel from the Attorney General's office at that time. Now we see the situation developing under section 4 of this act where the Attorney General is going to develop standards applicable to such grievance procedures and that these standards are to become effective within 30 days after they are published in the Federal Register unless one House or the other adopts a resolution of disapproval.

Mr. DAYS. Yes.

Mr. GUDGER. Then we find in subsection c that the provisions of the States standards are available in those instances where the Attorney General has found that the grievance procedure such as ours in North Carolina complies with his standards. Clearly, there could be different standards contemplated today within this time frame that you have just referred to in responding to Congressman Danielson's question than those standards which were deemed appropriate in 1975 when we adopted our act.

Do you think that this is enough lead time to allow the States to adjust their criteria?

Mr. DAYS. I find it hard to answer that question. I think it would depend on what the nature of the existing procedure was. Certainly I don't understand this legislation to require an identity between what, for example, the Federal Government may have as standards and what each State must have. It talks about general categories and I would think that if North Carolina has procedures, then it would be a question of whether these procedures meet the general requirements.

Mr. GUDGER. Here's the language for the 90-day suspension to apply "except that such exhaustion shall not be required unless the Attorney General has certified or the court has determined that such administrative remedy is in substantial compliance with the minimum acceptable standards promulgated pursuant to this section." In that event, there's a 90-day suspension.

Mr. DAYS. That's right.

Mr. GUDGER. How is all of this to take place within 30 days after you certify to the Federal Register the standards that you promulgate?

Mr. DAYS. I don't think this says that the States have to come into compliance within 30 days. The standards are simply there and then the certification process begins and to the extent that 1983 actions are brought between the time that the standards are promulgated and the time that a State comes up with a mechanism, then the courts will have to determine what constitutes substantial compliance. I would like to think there would be some flexibility during that period.

Mr. GUDGER. Then one other question. Do you know to what extent the states of the union have developed grievance procedures, such as that that I referred to in North Carolina, with or without the advice of the Attorney General?.

Mr. DAYS. I think that many States have such procedures. They don't cover all the categories that are contained in this legislation, but

in many respects they have been required to create such provisions by court order, Supreme Court determinations, or example, of what due process requires before certain types of sanctions can be imposed upon incarcerated persons.

Mr. GUDGER. Now finally, Mr. Chairman, I'd like to make one statement by way of clarifying a rather I think harsh question that I asked the witness at the conclusion of my previous inquiry. That was: Did not this act presuppose that the States were knowingly failing to maintain in their institutions minimum constitutional standards. That is generally due, I presume, to developing quality of the standards themselves as to what are appropriate services to be provided to confined persons and, second, to a reluctance of some States to apply those funds necessary to meet humane standards.

Mr. DAYS. I think that's correct.

Mr. GUDGER. Thank you.

Mr. KASTENMEIER. Well, if there are no further questions, I would like to thank you, Mr. Days, for a very thorough and complete review of not only H.R. 10 but the questions related to it and the Justice Department's position. You have served us well in that connection and our appreciation goes out to you. I take it in the days ahead we may again have to get in touch with you in connection with questions that may arise and changes that may be suggested.

Mr. DAYS. I will be available.

Mr. KASTENMEIER. And I do want to compliment you on your testimony this morning.

Mr. DAYS. Thank you.

Mr. KASTENMEIER. Next I would like to call as a panel Mr. Paul Friedman, managing attorney, Mental Health Law Project; David Marlin, director, Legal Research and Services for the Elderly, National Council for Senior Citizens; and Peggy Weisenberg, staff attorney, National Prison Project, American Civil Liberties Union Foundation, I appreciate the fact that on such short notice you witnesses and your organizations were agreeable to coming this morning to present your point of view. I would like to in turn call on each of you for your presentation. I would call on Mr. Friedman first and then Mr. Marlin and then Ms. Weisenberg.

TESTIMONY OF PAUL FRIEDMAN, DIRECTOR, MENTAL HEALTH LAW PROJECT

Mr. FRIEDMAN. Thank you.

Congressman Kastenmeier and distinguished members of the subcommittee, on behalf of the Mental Health Law Project, I am very pleased to have been invited to testify today on H.R. 10 which we continue to view as a vitally needed piece of legislation.

During 1977 hearings on H.R. 2439, we submitted extensive written testimony. I will not attempt to summarize my 1977 testimony, but would request that it be made a part of the current record.

Mr. KASTENMEIER. I'm not sure that it's absolutely essential that it be reinserted in this record since those statements continue to be part of the record before us, but nonetheless, I appreciate your calling to our attention your testimony which is in these hearings, serial No. 28, before the committee.

Mr. FRIEDMAN. Fine. That's clearly what's important. I think my prior testimony would give some flesh and blood to some of the points I will make briefly today.

I want to highlight the continuing need for this law and to mention a couple of important developments in the 18 months since that prior testimony, but I also want to stress that the three major themes of the prior testimony are just as valid today as at the time it was submitted.

First, there is a documentable and universally acknowledged emergency involving our country's mental institutions. In my prior testimony I went into some detail from the records of court cases around the country, public records, about the shocking conditions in institutions for the mentally disabled. Those conditions continue to exist. They have not abated in the interim. The rights of thousands of mentally ill and mentally retarded adults and children are still being violated today and each day.

My colleagues, for example, have recently visited a mental retardation institution where a number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.

The second major point detailed in my prior testimony was that these sad conditions in our public mental institutions involve violations of fundamental constitutional and human rights. That part of the prior testimony included an analysis of the growing body of State and Federal court precedent acknowledging that the horrifying situations that have been uncovered in our public mental institutions do in fact involve important violations of the due process clause or the equal protection clause or the eighth amendment or the first amendment or other amendments to the Constitution.

The only really new thing that I'd like to get into the record is that we have had a President's Commission on Mental Health. In its recent report that Commission has stressed protection of the basic rights of mentally disabled persons as one of its eight major recommendations. The Commission identified assuring "that mental health services and programs operate within basic principles protecting human rights and guaranteeing freedom of choice" as a national goal. It further concluded: "We are keenly aware that even the best intentioned efforts to deliver services to mentally disabled persons have historically resulted in well-documented cases of exploitation and abuse."

Although the full President's Commission did not speak to the specific issue of this bill, its Task Panel on Legal and Ethical Issues, which I was privileged to chair, did strongly endorse this legislation. The task panel, I should note, was an interdisciplinary group, including prominent mental health professionals and administrators, a State commissioner among them, as well as leading mental disability lawyers and consumers. And to quote briefly from the task panel report:

> This bill would greatly increase the likelihood of ameliorating unconstitutional and illegal practices and conditions in state institutions by providing to those persons who are least able to represent themselves a mechanism whereby their fundamental grievances can be addressed. The continuity of expertise and resources provided by the Department of Justice is an essential underpinning for the maintenance of responsible and high quality litigation.

Mr. Chairman, I would request that the report of the Task Panel on Legal and Ethical Issues be inserted in the new record.

Mr. KASTENMEIER. Without objection, that report will be received and made a part of the record. [See app. 3, page 216.]

May I ask at this point, when was that Presidential Commission on Mental Health commissioned and when did it report so we can have some time frame to consider its work, if you know?

Mr. FRIEDMAN. The President's Commission was established by executive order in February 1977 and its dual report was released on April 15, 1978. The Legal and Ethical Issues Task Panel report was given to the Commission in February 1978.

Mr. KASTENMEIER. Thank you.

Mr. FRIEDMAN. I should note that the President's Commission on Mental Health, in its final report to the President, identified the chronic mentally disabled children, adolescents, and the elderly, who represent significant parts of the population this legislation is designed to protect, as "underserved and inappropriately served populations which should receive priority attention," and one of the chief problems noticed by the Commission was inappropriate institutionalization. We do not need another Presidential Commission to study institutional problems—as I believe the National Association of Attorneys General has proposed. The problems are known in full, often gruesome detail, and Congress has clearly expressed the national policy of reducing inappropriate institutionalization and protecting the civil rights of the mentally disabled and other highly vulnerable people in a number of important pieces of carlier legislation, such as the Education for All Handicapped Children Act and its amendments, the Rehabilitation Act, and the Developmentally Disabled Bill of Rights and Assistance Act.

The final point I made in my prior testimony was that private advocacy resources are currently insufficient to protect institutional residents from deprivation of their constitutional rights. Sources of advocacy other than the Department of Justice are still woefully inadequate to meet the need, especially the need for major or systemwide litigation of pattern-and-practice variety. The participation of the Attorney General with the special resources that Assistant Attorney General Days has just outlined for the subcommittee is indispensable if the civil rights of institutionalized persons are to have any real meaning. The President's Commission cited the need for increased advocacy for the mentally disabled and proposed creation of effective advocacy agencies for the mentally ill analogous to the protection and advocacy agencies set up under the Departmental Disabilities Act for developmentally disabled persons. But, recognizing that such agencies are not sufficient, the Commission also recommended increased efforts by alternative legal advocacy agencies and the private bar.

The Mental Health Law Project has been closely involved with the beginning stages of the developmental disabilities protection and advocacy system. We operate a training and technical assistance project for the P. & A.'s, as they are referred to, in HEW region II and we are 1 of 3 regional legal-advocacy backup centers serving 22 State P. & A. agencies in 4 of the 10 HEW regions.

After more than a year of experience with the system, we see a number of limitations. First, as the President's Commission on Mental Health noted, the mentally ill are not covered under the existing protection and advocacy system, which is for the developmentally disabled. Second, the program is severely inhibited by the minimal funding that so far has been made available. According to a recent study completed by the American Bar Association, the typical P. & A. budget ranges from $25,000 to $50,000 a year, and many States receive only the minimum $20,000 grant with which to provide advocacy services for developmentally disabled persons throughout the entire State. Such a sum is obviously inadequate. The cost of even one system-changing class action lawsuit would quickly overwhelm the entire budget of almost any P. & A.

There's a final point which has been touched on in some of the prior questions by subcommittee members: Each State's protection and advocacy plan must be approved by the Governor and many P. & A. agencies are part of the State bureaucracy. As a practical matter, many of the protection and advocacy agencies therefore find it extremely difficult to mount a broad systemwide challenge to conditions in State institutions. The P. & A. agencies are too close to the State government; in these major class actions, they can get into the same kinds of conflict-of-interest situations which affect State attorneys general. The primary allegiance and responsibility of a State attorney general is to the executive department of the State and to the commissioners and superintendents of institutions. When a State legislature has expressed a reluctance to make necessary budgetary appropriations or when an executive department, because of competing demands, finds it impossible to make improving institutional conditions a top priority, it's very unlikely that a State attorney general will be able to represent effectively the interests of the individual residents of substandard and dangerous institutions.

As Assistant Attorney General Days has testified, the Department of Justice has continued to face debilitating problems in entering cases. They spend a lot of their time litigating procedural and technical issues like standing. This legislation is therefore more necessary than ever before. Barring some unlikely circumstance, such as a massive infusion of funds into the legal services programs or into public interest advocacy groups such as ours, the civil rights of mentally handicapped citizens in our public institutions will continue to be denied without the presence and resources of the Department of Justice. Institutionalized mentally handicapped people are far removed from access to adequate legal representation because of their incarceration, often in remote institutions because of the lack of lawyers with special training in communicating with mentally disabled persons, and by virtue of the specialized nature of the issues to be litigated. The mentally disabled persons in our public institutions tend to be disproportionately from the lower socioeconomic classes and from ethnic and racial minority groups and they often lack the resources to pay for private counsel. For these and the other reasons I have mentioned, in our opinion, passage of H.R. 10 is necessary as a vital source of protection and hope for thousands of our most vulnerable citizens.

Now there were one or two specific questions that came up moments ago which I would like to address very briefly. There is also a basic question about who is going to set standards in this area, which I can answer in relation to the mental health law cases that have been brought.

Basically, I would just like to follow up on what Assistant Attorney General Days was saying; that is, what the courts are doing in the mental health law cases—the *Wyatt* case, the *Willowbrook* case—are identifying situations of gross and shocking and obvious abuse, and saying that constitutional rights are being violated and that these situations must be addressed. They are not telling doctors or other mental health professionals how to practice their professions. They are not interferring with legitimate matters of medical or mental health professional discretion.

There are situations that I have seen, for instance, when I was one of the counsel in the Wyatt case in Alabama, where forced hysterectomies were performed on female residents of the State school because of what were referred to as feminine hygiene [i.e. menstrual] problems. The staff was so thin, the institution was so poorly funded and understaffed, that the normal kinds of caretaking one would expect couldn't go on, and to alleviate the pressures on staff a number of residents had been forced to undergo hysterectomies.

Or, to give another example, we came upon a ward where in theory an experimental behavior modification program was being undertaken. But there was such poor professional staffing that the untrained, lowest level aides and attendants were going around with cattle prods in a fairly unsystematic and sadistic way giving electric shocks to the residents on that ward.

The courts can identify strikingly inappropriate situations like this as constituting either malpractice or more often a violation of the eighth amendment's guarantee against cruel and unusual punishment or the due process clause. The courts then rely, as they do in many other substantive areas of law, upon the expertise of witnesses put forth both by plaintiffs and defendants as to what generally accepted standards are. The courts have been very careful not to require States to comply with utopian standards. Instead they have drawn upon a consensus of expert opinion to identify the minimum standards which constitutional provisions would require.

A second question had to do with whether the system will work adequately without intervention by Justice. I understand that the National Association of State Mental Health Program Directors takes the position that the normal litigation process is working just fine, that nothing is wrong, and that we don't need the participation of the Department of Justice.

Based on my own experience, I think this couldn't be further from the truth. What it's important to understand, to keep this issue in perspective, is that there are many, many clients out there needing services and many different kinds of cases.

There are now a number of Federal statutory entitlements for mentally disabled persons which give them a much better chance of receiving equal citizenship status, of being free from discrimination in our society. These stem from important acts passed by Congress which I

have already referred to—laws like the Rehabilitation Act and the Education for All Handicapped Children Act. Private lawyers or public interest firms like the mental health law project or legal services attorneys can do perfectly well at representing an individual family trying not to let a child be excluded from the regular school system but rather be provided with individually appropriate education pursuant to the Education Act. We have seen a great deal of this litigation, and advocacy agencies other than the Department of Justice can do it well, just as they can ably represent a developmentally disabled client who is claiming employment discrimination in violation of the regulations to section 504 of the Rehabilitation Act because of that person's developmental disability or mental handicap. And there are cases like the *Donaldson* case, in which my colleagues and I represented an individual mental patient whose claim finally reached the Supreme Court several terms ago: He was raising the issue of involuntary confinement that violated his due process right to liberty for 14½ years in a State mental institution in Florida. But this is very different from the pattern and practice systemwide class action which this bill would enable the Justice Department to bring.

Those pattern and practice type cases could require the work of two or three attorneys virtually full time for a half a year or a year in the discovery and investigatory process, let alone the litigation phase of the lawsuit. The resources of the FBI are needed in checking out allegations of malnutrition in an entire patient population or of deaths from intolerable physical conditions. Such detailed and elaborate factual investigations of alleged incidents of abuse as part of a pattern or a practice are simply beyond the resources, and in many cases the abilities, of the other elements of the advocacy network—the private practitioners, local bar associations, legal services offices, protection and advocacy agencies.

It's for that reason that we think this legislation is particularly important and it was those two points to which I specifically wanted to respond. I have no further testimony per se, although I would be happy to try and answer any questions either now or after the other members of the panel have presented their testimony.

Mr. KASTENMEIER. Thank you, Mr. Friedman.

[Complete statement follows:]

STATEMENT OF PAUL R. FRIEDMAN, MENTAL HEALTH PROJECT, ON H.R. 10

On behalf of the Mental Health Law Project, I am very pleased to have been invited to testify today on H.R. 10, which we continue to view as a vitally needed piece of legislation.

During 1977 hearings on H.R. 2439, we submitted extensive written testimony. I will not attempt to summarize my 1977 testimony, but would request that that testimony be made a part of the current record. Today I simply wish to highlight the continuing need for this law and to outline relevant developments in the 18 months since my prior testimony.

The three major themes of my prior testimony are just as valid today: I. There is a documentable and universally acknowledged emergency involving our country's mental institutions. The shocking conditions in institutions for the mentally disabled, so fully documented in the previous hearings, continue to exist. The rights of thousands of mentally ill and mentally retarded adults and children are still violated every day. My colleagues have recently visited an institution, for example, where some residents are literally kept in cages.

II. These sad conditions in our public mental institutions involve violations of the fundamental constitutional and human rights of the residents. The President's Commission on Mental Health, in its recent report, has stressed the need to protect the basic rights of the mentally disabled as one of its eight major recommendations. The Commission identified assuring "that mental health services and programs operate within basic principles protecting human rights and guaranteeing freedom of choice" as a national goal. (Report of the President's Commission on Mental Health, vol. 1 at 10, hereinafter cited as PCMH.) The Commission further concluded: "We are keenly aware that even the best intentioned efforts to deliver services to mentally disabled persons have historically resulted in well-documented cases of exploitation and abuse."

Although the full Commission did not speak to the specific issue of this bill, its Task Panel on Legal and Ethical Issues, which I was privileged to chair, strongly endorsed the legislation. The Task Panel was an interdisciplinary group, including prominent mental health professionals and administrators, as well as leading mental disability lawyers and consumers. To quote briefly from the Task Panel report:

"Proposed Federal legislation supported by the Administration would authorize the United States Department of Justice to intervene in or initiate civil actions when there is a pattern or practice of violations of the Federal constitutional and/or statutory rights of individuals incarcerated or institutionalized in State facilities. This bill would greatly increase the likelihood of ameliorating unconstitutional and illegal practices and conditions in State institutions by providing to those person who are least able to represent themselves a mechanism whereby their fundamental grievances can be addressed. The continuity of expertise and resources provided by the Department of Justice is an essential underpinning for the maintenance of responsible and high quality litigation." PCMH, vol. IV at 1373.)

I request that the report of the Task Panel on Legal and Ethical Issues be inserted in the record.

The PCMH also identified the chronic mentally disabled, children and adolescents and the elderly—who represent significant parts of the population this legislation is designed to protect—as "underserved and inappropriately served" populations which should receive priority attention. (PCMH, vol. 1 at 4–7.) One of the chief problems noted was inappropriate institutionalization.

We do not need another "Presidential Commission" to study institutional problems—as I believe the National Association of Attorneys General has proposed. The problems are known in full, often gruesome detail, and Congress has clearly expressed the national policy of reducing inappropriate institutionalization and protecting the civil rights of the mentally disabled and other highly vulnerable people. H.R. 10 is one very important part of that effort.

III. Private advocacy resources are currently insufficient to protect institutional residents from deprivation of their constitutional rights. Sources of advocacy other than the Department of Justice are still woefully inadequate to meet the need, especially the need for major system-changing litigation. The participation of the Attorney General, with his resources for maintaining complex and protracted litigation of the pattern or practice variety, is indispensable if the civil rights of institutionalized persons are to have any real meaning. The President's Commission cited the need for increased advocacy for the mentally disabled, through creation of effective advocacy agencies for the mentally ill (analogous to the P&A system). But recognizing that such agencies are not sufficient, the Commission also recommended increased efforts by alternative legal advocacy agencies and the private bar. (PCMH, vol. I at 42, 69.)

The Mental Health Law Project has been closely involved with the developmental disability P&A system. We operate a training and technical assistance project for the P&A's in HEW Region II and are also one of three regional legal-advocacy backup centers serving 22 states' P&A systems in four regions. After more than a year of experience with the system, a number of limitations are now apparent. First, as the PCMH noted, the mentally ill are not covered under the existing P&A system for the developmentally disabled. Second, the program is severely inhibited by the minimal funding so far made available. According to a study recently completed by the American Bar Association, the typical P&A budget ranges from $25–50,000—and many states receive only the $20,000 minimum grant—with which to provide advocacy services to an entire state. Such a sum is painfully inadequate. The cost of even one major lawsuit

(of the kind the Justice Department could maintain) would quickly overwhelm almost any P&A agency. In addition, each state's P&A plan must be approved by the governor, and many are part of the state bureaucracy. Many P&A's therefore are unable in practice to mount broad challenge to the state system. For these reasons, it would be naive to expect the P&A agencies ever to play a role that would "duplicate" that of the Department of Justice under the proposed law.

As Assistant Attorney General Days has testified, the Department of Justice has continued to face debilitating problems in entering cases. This legislation is therefore more necessary than ever. Barring some unlikely circumstance, such as a massive infusion of funds into the legal services programs or into public interest advocacy groups, the civil rights of mentally handicapped citizens in our public institutions will continue to be denied without the presence and resources of the Department of Justice. Institutionalized people are far removed from access to adequate legal representation, because of their incarceration, the lack of lawyers with special training in communicating with mentally disabled persons, and the specialized nature of the issues to be litigated. In our opinion, passage of H.R. 10 will assure a vital source of protection and hope for thousands of our most vulnerable citizens.

Mr. KASTENMEIER. Mr. Marlin.

TESTIMONY OF DAVID MARLIN, DIRECTOR, LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, NATIONAL COUNCIL FOR SENIOR CITIZENS

Mr. MARLIN. Thank you, Mr. Chairman.

I feel privileged to be here to testify on this important bill and to provide the support of the National Council of Senior Citizens.

I have for the past 10 years directed a legal program that the National Council of Senior Citizens has sponsored. During that time we have had a substantial involvement with institutionalization, particularly with respect to nursing homes and nursing care, and I would like to concentrate my testimony this morning on the inclusion of nursing homes in the bill—nursing homes, skilled and intermediate, residential and custodial care.

I, of course, heard this morning the colloquy that Mr. Days had with Mr. Moorhead with respect to the rather significant legal issue on the coverage of privately owned and operated nursing homes under the bill. If I may, I'd like to provide some background and then be prepared to talk a little bit about that legal difficulty.

The trend to nursing care in this country really started with enactment of the Social Security Act in 1935. Prior to that time, most communities housed persons who were ill and infirm, and who were not able to be taken care of at home in public poor houses. The Social Security Act provided some income for persons who reached the age of 65 and who retired. The act also prohibited payments going to institutions and from that there came a gradual increase in foster homes to take care of persons who couldn't otherwise be taken care of at home. These foster homes eventually added nursing care and thus came the evolution of nursing care through nursing homes as we started to know it in this country.

But the big impetus came when Congress added titles 18 and 19 to the Social Security Act in 1965, the medicare and medicaid programs.

The nursing home industry is a rather unique one today in that two-thirds of its revenue comes from the Federal Government and participating State medicaid payments. The number of nursing homes from 1960 to 1976 in this country increased 140 percent, from 9,000 to the

approximately 23,000 that there are today. Nursing home beds increased from 331,000 to almost a million and a half, an increase of over 300 percent. The number of employees increased 550 percent, from 100,000 to 650,000. The number of patients increased from 290,000 to approximately 1 million, and the expenditures have increased 2,000 percent, from $500 million to about $10.5 billion. Actually, the $10.5 billion figure is about 2 years old. It's estimated that it's about $12 billion today and I think in fiscal year 1979 somewhere around $14 billion.

During all this time the number of older persons aged 65 increased only 23 percent, from 17 to 21 million.

We believe the explanation of the growth in nursing care is that $6 billion of the $10.5 billion in nursing home revenues is paid for from medicaid and medicare. Nursing home expenditures today account for about one-third of the $15 billion that is spent under the medicaid program.

Let me give you a brief profile of the million nursing home patients today. I have a litle table in my testimony and I will just run through it quickly without all the details contained in the testimony.

Most of those million persons are old. The average age is 82. Three to one are women. Most of them are widowed. Only 10 percent have a living spouse. Most of them are alone in that 50 percent or so have no close relatives. Most of them came to the nursing home from their own home. The length of stay is about 2½ years and only 20 percent of those who are there ever return home. Most of them die in the nursing home.

So you have a profile of an old and infirm, helpless, highly vulnerable population.

Now the abuses in nursing homes—to relate this to H.R. 10 and the protection of the constitutional rights of persons who are confined or who are residents of institutions—the abuses of nursing homes in recent years have been fairly well documented. I would refer the committee to the 12-volume report entitled "Nursing Home Care in the United States—Failure in Public Policy" that the Senate Committee on Aging published in 1975. There's also an excellent book that was published in 1977 called "Too Old, Too Sick, Too Bad—Nursing Homes in America," written by former Senator Moss, who chaired the Senate Committee on Aging subcommittee, and Val Halamandaris, the chief counsel of that committee who worked on the nursing home report.

Some people have called nursing homes small hospitals, but with no doctors, which isn't a completely fair comment. Most nursing homes in this country do a good job. They are conscientious. They provide good care. They work hard to make sure the patients receive the care that they are entitled to. But many do not. Many providers of nursing home care have been singled out for operational abuses which, I believe, are very analogous to the kinds of testimony you have heard from Mr. Friedman, on my left, and from Mr. Halpern in your hearings in the spring of 1977.

In other words, the conditions for many nursing home patients are very similar to the conditions of patients who are mentally ill and mentally retarded. I'm referring to the kinds of abuses that occur. The most common abuses involve death by fire caused by negligence, exposing patients to infectious disease, medical neglect, deliberate

injury caused by staff, refusal by staff to render needed assistance, deliberate oversedation or drugging of patients, unnecessary and inhumane physical restraints, starvation or inadequate or inappropriate diets, lack of privacy, supervisory negligence so that patient injures patient, unsanitary conditions such as food poisoning, filthy dressings and laundry, and finally, misappropriation and theft of patients' funds and valuables.

Now the remedy for these abuses—we are again relating it to medicare and medicaid payments—is primarily that of the provider of the funds, which is the Department of Health, Education, and Welfare. HEW has three basic approaches to ensuring that Federal money buys decent care. First is the creation of standards, standards of care that are enforced by State licensing, Federal certification, periodic inspections. Second is the reimbursement formula in which the reasonable cost of care is covered through medicare. Finally, the physician peer review program. But none of these has worked sufficiently, which is a representation that the Senate Committee on Aging reports establish beyond a doubt.

You also have in your testimony, received at the 1977 hearings, an excellent article by Prof. John Reagan, now the dean of Hofstra Law School, an article published in the Georgetown Law Review, which describes the process of enforcement of nursing home violations and nursing home patient rights.

I would add my endorsement to what Mr. Friedman has said: There is not sufficient private advocacy in this country to provide representation for nursing home patients or to mount the kind of overview that the Assistant Attorney General of the Civil Rights Division would have the responsibility to do for the Department of Justice.

I want to turn now to the issue of the coverage of nursing homes in the bill, reminding the committee that only approximately 8 percent of nursing care in this country is provided by public institutions; 92 percent is provided by private; 77 percent of nursing care provided is done for profit by proprietary institutions.

I think that the coverage of H.R. 10 with respect to private nursing homes is not completely clear. I think that the critical phrase is in the definition of institution in which it says an institution is, among other things, one that is owned or operated pursuant to a contract with a State or political subdivision. I think that inserting that phrase is important and it permits the kind of case-by-case analysis of private nursing homes that the Department of Justice would have to make in order to form a judgment whether or not a suit should be brought.

Going back to the coloquy this morning with Assistant Attorney General Days, it would be our contention that, as I believe he stated, there would be a number of factors that would have to be considered in making a decision as to whether or not the factual situation to be investigated would be covered by the bill. One criteria of coverage is the extent of regulations under medicare and medicaid that are applicable to the particular nursing homes. Another is the provider agreements themselves. Another would be whether patients are placed in a nursing home or referred to a nursing home by a State institution or some State agency.

It is our strong belief, Mr. Chairman, that the bill should provide authority for the Department of Justice to bring a pattern and practice suit against private nursing homes if the facts indicate that those nursing homes are infused with a public responsibility or perform a public function or receive a substantial amount of financial support that comes into the home through provider agreements as well as other indexes of State contact.

I would like to conclude with two recommendations for amendments to the bill. First, the section of the bill which calls for reports by the Department of Justice to be made to the Congress on the business of the Department of Justice pursuant to the bill. With respect to prisons, jails, and correctional facilities, the reporting requirement is more extensive than it is for facilities for the retarded and mentally ill, the handicapped, or for nursing care; and I would recommend to the committee that that same detailed particularity be applied to the latter as well as to corrections so that we will have an idea of the kinds of complaints that come in as well as what action is taken on the complaints.

Second, I believe that authority for the Attorney General to resist retaliation and intimidation of residents and inmates might be added to the bill. I know it was in a bill that Mr. Railsback had sponsored in the last session of Congress. I believe it's also in S. 10 and I think—I just judge in part from my own previous years as an attorney in the Civil Rights Division where many institutions under investigation felt that they might take some of the pressure off by providing some retaliation or some intimidation—that it's good to have it in the bill. The authority may be somewhat inherent, but it's good to have it in the bill because it provides another method for the Attorney General to exercise some influence in his work under the act.

Thank you.

Mr. KASTENMEIER. Thank you very much, Mr. Marlin.

[Complete statement follows:]

STATEMENT OF DAVID H. MARLIN, DIRECTOR, LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, SPONSORED BY THE NATIONAL COUNCIL OF SENIOR CITIZENS

Thank you for inviting me to testify today on H.R. 10.

I represent the National Council of Senior Citizens, an organization consisting of about 3.8 million older persons in approximately 3,500 clubs and chapters throughout America. Organized in 1961, the Council has maintained a consistent presence before federal, state and local officials, seeking to improve the lives of older Americans and, in particular, protect the interest of those who are most defenseless, infirm and vulnerable.

We have closely followed the legislative effort in the 95th Congress to provide authority for the United States Attorney General to go to court to prevent violations of the constitutional rights of institutionalized persons. The bill under consideration today, H.R. 10, is nearly identical with H.R. 9400. Only the authority of the Attorney General to intervene has been deleted.

We strongly support H.R. 10 and commend the continued dedication of the Chairman and the members of the Subcommittee to accomplish this objective.

Protecting the rights of institutionalized persons is the primary responsibility of persons that operate the institution, whether it be a prison, a mental hospital, a facility for the mentally retarded or a nursing home. But when those rights, constitutional and statutory, are being violated by the institution itself and when the inmates or patients are unable to secure protection, our system of justice looks elsewhere for relief.

Courts, in recent years, have turned to the U.S. Department of Justice to provide its resources, its counsel and its broad perspective. This is highly appropri-

ate. H.R. 10 would remove some of the ambiguity that has arisen concerning the Department's authority to assert the Government's interest in protecting rights guaranteed by the U.S. Constitution.

Having served as a trial lawyer in the Civil Rights Division of the Department from 1961–65, I have a deep appreciation of its role. I know it has exercised discretion with good judgment. I also know there is no force in American justice better equipped to vindicate violations of civil rights and, most importantly, keep healthy the spirit of America.

I want to concentrate my testimony on the impact the bill could have on nursing, custodial and residential care. Let me briefly develop these points:

1. Institutionalization in a nursing or related home affects many Americans and a substantial amount of public revenue.

2. There are well-documented abuses of nursing home patients by public and private institutions, similar to those affecting the mentally infirm and retarded.

3. There is no adequate private remedy or public advocate by which patients and their families can secure relief from these abuses.

4. Government, Federal and State, has moved slowly, and sometimes not at all, to enforce patient rights.

5. H.R. 10 recognizes a national obligation to ensure that institutions which received Federal funds for the provision of health care and services are not systematically abusing their patients and the public trust.

A few words of explanation.

The fact that the United States has an increasing aged population is no secret to the Congress. Fiscal reform to preserve the integrity of the Social Security system were enacted last session. One reason legislation was needed is that the ratio of workers to retirees is diminishing as the longevity of Americans is increasing.

In 1900, there were about 3 million Americans over the age of 65, about 4 percent of the population. In 1975, the number had increased to 21 million, about 10 percent. Life expectancy increased from 47 to 70 years during this period.

The trend to nursing homes, as opposed to public poor houses where the infirm had been confined, began in the 1930's with the enactment of the Social Security Act. Old age assistance was barred to persons in public institutions. Older persons now also acquired retirement benefits, which meant they could live at home or in foster families. Gradually these foster homes began to add nursing services and call themselves nursing homes. Urbanization and job mobility have also contributed to the lack of inter-generational care of a family's elder members.

The real impetus to today's nursing home industry, however, was the addition to the Social Security Act in 1965 of Medicare and particularly Medicaid. Nursing care became big business, a hot number on the stock exchange. Major corporations, chains and franchises were the result.

From 1960 to 1976, the number of nursing homes increased 140 percent from 9,000 to 23,000; beds from 331,000 to 1,327,000 (302%); employees from 100,000 to 650,000 (550%); patients from 290,000 to 1,000,000 (245%); and expenditures from $500 million to $10.5 billion (2,000%). The aged population grew only 23 percent, from 17 to 21 million.

The explanation of the growth is that $6 billion of the $10.5 billion is paid for by Medicaid and Medicare. Nursing home expenditures today account for about one-third of the $15 billion Medicaid program.

Let me give you a profile of the 1 million nursing home patients that can be found on any day in the United States.

TABLE 1–1.—*A profile of America's 1 million nursing home patients*

They are old: Average age 82; 70 percent are over 70.

Most are female: Women outnumber men 3 to 1.

Most are widowed: Only 10 percent have a living spouse. Widowed, 63 percent, never married, 22 percent; divorced, 5 percent.

They are alone: More than 50 percent have no close relatives.

They are white: Whites, 96 percent; blacks, 2 percent; others 2 percent.

They come from home: Some 31 percent come from hospitals, 13 percent from other nursing homes, the remainder from their own homes.

Length of stay: An average of 2.4 years.

Few can walk: Less than 50 percent are ambulatory.

They are disabled: At least 55 percent are mentally impaired; 33 percent are incontinent.

They take many drugs: Average 4.2 drugs each day.

Few have visitors: More than 60 percent have no visitors at all.

Few will leave: Only 20 percent will return home. Some will be transferred to hospitals, but the vast majority will die in the nursing home.

Now, what are the abuses of nursing home and related institutions that have been documented. I will merely outline them, calling the Committee's attention to the thorough 12-volume report entitled "Nursing Home Care in the United States: Failure in Public Policy", prepared by the Subcommittee on Long Term Care, Senate Committee on Aging in 1975 and an excellent book published in 1977 entitled "Too Old, Too Sick, Too Bad—Nursing Homes in America", written by former Sen. Frank Moss and Val Halamandaris, formerly Associate Counsel of the Senate Committee on Aging.

Some people have called nursing homes small hospitals but with no doctors. That is not a fair comment, of course, for many nursing homes that conscientiously deliver good medical care as well as sympathetic and compassionate handling. But too many providers (of which 92 percent are private, and 70 percent operate for profit) have been tarred with operational abuses, similar and often identical to the conditions that produced *Wyatt* v. *Stickney* and the Willowbrook cases involving the mentally ill and retarded.

Sen. Moss and Mr. Halamandaris describe in agonizing detail the second largest nursing home in the United States—the J. J. Kane Hospital in Pittsburgh. But they point out that Kane represented the sum of abuses, one or more of which occurs commonly. The most common abuses involves death by fire caused by negligence, exposing patients to infectious disease, medical neglect, deliberate injury caused by staff, refusal by staff to render needed assistance, deliberate over-sedation or drugging, unnecessary and inhumane physical restraints, starvation or inadequate and inappropriate diets, lack of privacy, supervisory negligence so that patient injures patient, unsanitary conditions such as food poisoning and filthy dressings and laundry and misappropriation and theft of patient funds and valuables.

When abuse occurs, what are the remedies?

HEW, with its provider contracts for Medicare and Medicaid payments, has a clear responsibility to see that high quality care is provided in federally subsidized homes.

Several methods are used: Creation of standards of care enforced by state licensing, federal certification, periodic inspections and sanctions; reimbursement of "reasonable cost" of care; and physician peer view.

None have worked, a representation well established by the Senate Committee on Aging's report and described in the 1972 article by John Regan from the Georgetown Law Journal contained in the report of your hearings in the last Congress.

Private litigation is an illusion and there simply are not public interest law groups with the resources to even make a dent, much less mount a nationwide strategy.

Mr. Chairman, I wish to conclude with the observation that the coverage of H.R. 10 with respect to nursing homes is unclear. Would the "state action" concept embedded in the bill extend to privately owned and operationed facilities? What does the Committee intend?

As Prof. Regan pointed out:

"Private persons or corporations own and operate most nursing homes either for profit or as charitable enterprises. Only eight percent of the nation's 23,000 homes is publicly owned. To constitute state action * * * a private home's activities must be imbued with state involvement to a significant degree. This question rarely has been litigated as to nursing home, * * *"

The connection between state government and nursing homes certainly include financial support (Medicaid) and regulatory schemes. There are tax exemptions, construction funds and low-interest loans. There are assignments and referrals of patients.

But there is not public policy-making for private facilities, as in the case with some hospitals. There usually is an insufficient nexus with the nursing or medical care provided so that the services could be considered state services.

Nursing, residential and custodial care, therefore, differs sharply from treatment of most mentally ill and retarded persons, where the majority of care is provided in public settings. Only a fraction of nursing and related care comes from public entities. It is questionable whether the vast bulk of abuses will be available for Department of Justice pattern or practice litigation initiation.

The key clause in H.R. 10 that should be interpreted to extend coverage to private facilities is "pursuant to a contract". Would Medicaid service provider agreements, for example, be sufficient? We believe so. There is a massive amount of federal funding through Medicaid and Medicare that is provided directly to nursing homes.

Some nursing and related institutions receive all their income from government contracts. And the regulation is equally persuasive.

We believe it just and appropriate that nursing homes that seek and accept extensive government funds to perform a regulated service should be treated as performing state functions for purposes of this Act.

Mr. KASTENMEIER. Now we'll hear from Ms. Weisenberg who has been very patient as our last witness in what used to be this morning and is now this afternoon.

TESTIMONY OF PEGGY WEISENBERG, STAFF ATTORNEY, NATIONAL PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Ms. WEISENBERG. Thank you, Mr. Chairman.

The National Prison project is pleased to testify on H.R. 10 which would authorize the Justice Department to bring actions for redress in cases involving deprivations of constitutional and statutory rights for institutionalized persons.

We, too, testified last year and will not repeat our testimony; however, I would like to address myself to the continuing need which we feel for this legislation and to specific language in the bill which we believe should be amended or deleted.

A year ago we testified about the resources that our office expended in the trial of the Alabama statewide prison case. Today we are still litigating compliance with court orders in that case. Why? Because prisoners in Alabama are still being deprived of their rights guaranteed under the U.S. Constitution.

As the U.S. District Court for the northern district of Alabama stated just 2 weeks ago, "The history of Federal litigation in Alabama is replete with instances of State officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing."

On October 4, 1972, the U.S. District Court in Alabama held that the failure of the board of corrections to afford the basic elements of adequate medical care to inmates in the Alabama prison system constituted "a willfull and intentional violation" of their rights under the 8th and 14th amendments. Four years later, when the Court issued its order in *Pugh* v. *Locke*, those same serious shortcomings persisted. What Pugh revealed, however, was that such shortcomings were endemic to every phase of the prison system's operation. The conditions of confinement then violated any judicial definition of cruel and unusual punishment.

In September of 1978, hearings were held to determine the degree of compliance by the board of corrections with the Alabama court orders. The court in Alabama, as in other cases that we handled, have

given the State officials opportunities since the court orders to come up with plans to remedy the violations in their institutions. Unfortunately, the court found that "the overwhelming weight of evidence presented at the time of the compliance hearings established that what was true in 1972 and in 1976 when the court issued its orders, is still true today. The very fact of confinement in Alabama's penal system continues to contravene the 8th and 14th amendment rights of the plaintiffs."

Alabama is not atypical. *Newman* v. *Alabama*, Memorandum and Order February 2, 1979. In Rhode Island the U.S. District Court issued an order finding the conditions of confinement in Rhode Island prison systems included the lack of sanitation, idleness, fear of violence, inadequate medical care, inadequate or total absence of classification process and educational programs constituted cruel and unusual punishment. Those conditions constituted serious constitutional violations as well as violations of State statutory law.

The case went to trial in April 1977. The decision was issued in August. Since that time our project has represented the prisoner plaintiffs at approximately 19 hearings or court conferences on compliance. Posttrial costs to our project have exceeded $45,000. In the 18 months which have elapsed since the court issued its order there have been little or no discernible improvements, despite the fact that the State was given the opportunity to come up with plans. As the court stated in its memorandum and order of February 9, 1979, "the graveyard of the *Palmigiano* suit is filled with tombstones of missed deadlines." Just 5 days ago, Judge Pettine gave State officials another extension of time to submit a plan to remedy constitutional violations forewarning them that failure to meet deadlines will result in the imposition of sanctions.

As the litigation in Alabama and Rhode Island woefully demonstrates, conditions of confinement in the Nation's prisons and jails continue to fall below minimally acceptable constitutional and professional standards of decency. And again I would point out, as Mr. Friedman pointed out, that we are talking about minimal standards, not ideal standards—just the very basic minimums.

State officials have ignored their responsibilities to remedy violations until they are forced to do so under court orders, and our experience has shown that even when the State officials have been under court orders, they have failed to comply with the minimum constitutional requirements until they are subject to sanctions. The fact is that conditions of confinement in prisons and other closed institutions will not change without the intervention of the courts.

Given this reality, we face the very serious problem that there are very few lawyers in the country who are willing and able to take institutional litigation and carry it through to compliance. Institutional litigation is complex and costly. The resources of public interest groups and of legal services are small. We can only take on a few cases a year, and as I mentioned earlier we have had to spend an inordinate amount of time enforcing those orders in cases we have already won. Unfortunately, this means that most institutionalized persons continue to suffer constitutional deprivations and are unrepresented in many cases.

Therefore, we heartily support the efforts of Congress to address this problem through legislation which would authorize the Justice Department to initiate actions to enforce the rights of institutionalized persons and, as Drew Days has pointed out, the Justice Department is particularly well suited to handle these cases and does have the resources to do so.

Although we support H.R. 10 in concept, we urge those sections of the bill which result in limiting access to the courts and those sections which treat prisoners differently from other institutionalized persons be revised.

We strongly oppose section 4 of the bill which would require prisoners who bring private actions under 1983 to exhaust State administrative remedies.

Section 4 of the bill has nothing to do with the proposed legislation granting the Attorney General standing to initiate actions on behalf of institutionalized persons. It is a rider which would graft on a new and unprecedented requirement to the Civil Rights Act of 1871.

The rider is designed to treat prisoners differently from all other citizens in the United States, institutionalized or not. All citizens will be entitled to direct access to the courts under 1983 except for prisoners.

The enactment of legislation which would require prisoners to exhaust administrative remedies would overrule 20 years of civil rights law and constitute a radical departure from the current law of the land. There is a long and uniform history of Supreme Court decisions that have established that plaintiffs not be required to exhaust administrative remedies before being permitted to proceed in Federal court under section 1983. The Supreme Court has explicitly held that State prisoners challenging the constitutionality of living conditions under the Civil Rights Act not be subjected to stricter standards of exhaustion than other civil rights plaintiffs.

The purpose of the Civil Rights Act, as the courts have pointed out, is to provide a remedy in Federal courts which is supplementary to any remedies the State may have, irrespective of the availability and the adequacy of those remedies.

Prisoners have a fundamental constitutional right to access to the court. The Supreme Court has reiterated this just last year. Current limitations on the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of otherwise sound constitutional principles.

Section 4 of the bill is premised on the assumption that the exhaustion requirement would reduce the amount of prisoner litigation in the courts, yet there is no hard data to support the contention that an exhaustion prerequisite could in fact reduce the number of prisoners' civil cases which are filed.

I know Mr. Gudger asked how many States have grievance mechanisms—43 States now have grievance mechanisms in State prisons and jails. I would point out that the Annual Report of the Director of the Administrative Office of the Courts shows that despite the availability of grievance mechanism, prisoner filings have increased. Nonetheless, if you look at the statistics, the burden on the courts has remained the same. The court only has hearings on 4.6 percent of those cases. Most of them are disposed on the papers. That 4.6 figure is consistent with the figures that have been reflected since 1970.

Even model grievance procedures are unlikely to reduce filings. Prisoners who seek monetary damages, prisoners who seek interpretations of their constitutional or statutory rights, will continue to file 1983 cases in the courts because administrative officials simply do not have the authority to grant monetary damages or the expertise to make declaratory rulings of law which is uniquely reserved to the courts under article III of the Constitution.

Experience shows that, contrary to the intended purpose, an exhaustion requirement is likely to result in an increased burden on the courts. Certainly Congress does not intend this. If section 4 is enacted, each civil rights case brought by a prisoner will involve a new phase of litigation on procedural matters before the court ever reaches the merits of the case. As I said earlier, now the courts are not holding hearings on many of these cases and this type of requirement is likely to increase the burden on the courts because courts will have to hold an additional hearing to determine whether the administrative remedy is speedy. and whether it's available in each case. An exhaustion mechanism will not weed out cases of constitutional merit from those which are frivolous. Ultimately, courts of law will have to make that determination. An exhaustion requirement will only delay court action and final disposition on the merits.

I would like to point out that even a 90-day delay might result in unnecessary and serious harm to detainees and prisoners. In a jail case, a mandatory 90-day delay would mean that a pretrial detainee who brings a 1983 action challenging conditions of confinement would be denied direct access to the court even though the detainee is presumed innocent until trial and may be incarcerated simply because he or she did not have enough money to make bail. For prisoners and pretrial detainees alike, every day of delay in a civil rights case of the type we are talking about, seeking injunctive relief from unconstitutional conditions of confinement, may subject those prisoners to continuous harm.

In damage cases, a mandatory 90-day stay would mean that the prisoner plaintiff would have to wait at least 90 days before he or she could even begin discovery under the Federal Rules of Civil Procedure. This type of delay in a damage case, where speedy discovery of witnesses and preservation of evidence is critical, could result in prejudicing the prisoners' ability to prepare and prove their case.

Granting the Attorney General the authority to vindicate constitutional rights of institutionalized persons and in the same statute imposing an exhaustion requirement on private civil rights suits by prisoners is an unnecessary and unacceptable tradeoff. "It should not be necessary," as the American Bar Association has said, "to take away an individual's rights to access to the Federal courts in order to secure enjoyment of other constitutionally protected rights."

I would like to point out that we are not opposed and would welcome the development and refinement of good and adequate grievance procedures. We are opposed to having those procedures be a bar or a stay to court action.

Let me address myself to several other sections of the bill which we believe should be revised. Section 2 of H.R. 10 specifies that for prisoners only equitable relief shall be available only insofar as persons are subjected to conditions which deprive them of rights, privileges and immunities secured by the Constitution.

Assistant Attorney General Days has pointed out this provision and suggested that it be deleted. We, too, believe that the exception language should be stricken. If Congress is serious about enacting legislation to enforce the constitutional and statutory rights of institutionalized persons, it does not make sense to make a subclass of institutionalized persons such as prisoners and say to them that the U.S. Government can enforce rights which are guaranteed by the Constitution but cannot enforce rights which are guaranteed by Federal statutes.

We believe that the exception language as it appears places serious substantive limitations on prisoners' suits. We would call your attention to the fact that the exception language appears to impose a substantive limitation on the Attorney General's ability to initiate litigation to address deprivations of Federal statutes when coupled with deprivations of constitutional violations. Moreover, the exception language as written appears to place substantive limitations on the nature and extent of equitable relief which courts can grant in prisoner cases.

As Attorney General Days has pointed out, often currently the Justice Department is very concerned with enforcing the civil rights statutes in institutions that are still segregated. We certainly would not want this exception language to bar the Attorney General who comes into a general condition of confinement suit from being able to raise those very same type of allegations.

Furthermore, I'd like to point out that in our own litigation which we brought on behalf of prisoners in all parts of the country, we have challenged conditions of confinement which subject prisoners to violations of State constitutional and statutory provisions as well as the Federal provisions.

In our Tennessee case we challenged the violations of Federal constitutional rights and the violations of State statutory and constitutional provisions. The court found there that the legality of prison conditions in Tennessee are to be measured by an even higher standard than that established by the eighth amendment to the U.S. Constitution because in that State the Constitution required the prisoners be entitled to humane treatment and treatment with humanity and not subject to harsh and cruel treatment.

Similarly, the court in Rhode Island found that the defendant's unwillingness or inability to obey the clear commands of Rhode Island's statutes was actionable as a matter of State law and through pendent jurisdiction acted on those claims.

The exception language of section 2 seems to suggest that if the Justice Department had represented those prisoners in Tennessee and Rhode Island in an omnibus challenge, which this legislation would allow through consolidation of many complaints, equitable relief could only be granted insofar as prisoners were subjected to conditions which deprived them of rights under the Federal Constitution. We urge that no substantive limitations be attached to relief which is available.

With respect to the general standing provisions of section 2, we would urge members of this subcommittee and the House of Representatives not to amend or add language which would have the effect of placing additional barriers between all institutionalized persons—mentally ill, prisoners, and the aged—and the courts. For example,

we note that the parallel provision in the Senate bill, S. 10, would limit the authority of the Attorney General to initiate an action on behalf of institutionalized persons in cases where he believes a State is subjecting persons residing in an institution to egregious or flagrant conditions which are willful or wanton or of gross neglect.

This language is a vestige of the second class citizenship our society has placed on all institutionalized persons. No other civil rights enforcement statute requires that deprivations of constitutional rights be egregious or flagrant or willful or wanton; I urge the committee to look at some of the enforcement statutes—the voting statutes, the fair housing statutes, the revenue sharing statutes. None of them places this type of extra requirement. There is no justifiable reason why the enforcement of constitutional rights should be held to a stricter standard for institutionalized persons that for other citizens.

We support the language in the House bill and we believe that the House version places sufficient limitations on Federal enforcement suits by requiring that actions initiated by the Attorney General involve a pattern or practice of resistance and not the single isolated complaint.

Section 3 of the bill requires the Attorney General to undertake a potentially exhaustive and time-consuming certification process before he can initiate a civil rights action on behalf of institutionalized persons. While it is both useful and beneficial for the Federal Government to provide assistance and advice to State officials as to funding sources and possible remedies, it is both impracticable and we believe unfair to impose a requirement like section 3(a)(2) that the Attorney General make an exhaustive effort to consult and negotiate with numerous State officials as a prerequisite to filing a lawsuit, especially when the Justice Department's investigation indicates that the State is subjecting inmates to conditions of confinement which constitute a pattern or practice of constitutional deprivations. It is impractical from the standpoint that litigation could be postponed for months, perhaps even years, while the consultation process is occurring. Obtaining Federal funds or technical assistance from the Government, even for a simple project, can be time-consuming and could result in further delay.

Section 3(a)(3) which allows State officials to have reasonable time to take appropriate action to correct deprivations causes similar problems. Litigation could be stalled indefinitely and, more significantly, rights would be violated continually. It is our experience that even the best intentioned and comprehensive plans, which can be developed quickly, meet with difficulty and resistance in the implementation phase. While we wholeheartedly support the notion that officials themselves institute actions to correct abuses and constitutional deprivations, this process can take place during the course of litigation and can even be greatly aided by the pressure of court action.

I'd like to point out that State officials have on occasion invited our propect and others to sue. Litigation has helped them get the needed assistance they were unable to obtain from their own State legislatures.

Mr. Kastenmeier raised questions earlier about the defenses that are used in these cases. Oftentimes, States come into the litigation that we have handled and say that they have plans but they don't have the

money from their legislatures to implement their plans. Unfortunately, this is the case, but litigation has helped to obtain funding for those plans. I would point out to the lawyers on the committee that throughout the process of litigation, if an issue is settled, that issue will drop out of the case. Sometimes, the case will become moot. But when the constitutional deprivations exist, the courts have stepped in. They have given the time to the States to come up with plans, but when the States haven't come up with plans or have come up with inadequate plans and the courts have found that those constitutional violations continue to exist, the courts have enforced their orders.

It is essential to bring section 3 of this bill in line with the certification procedures outlined in other civil rights statutes. Title 7 of the Civil Rights Act of 1964 and other civil rights statutes do not require an elaborate procedure in order to certify a case as one of general importance. There's certainly no rational basis or compelling justification for subjecting institutionalized persons to a more rigorous certification process which could result in inordinate time delays in initiating legal action.

We therefore would urge that section 3 be amended to read simply that at the time of the commencement of an action under section 2 of this act, the Attorney General shall certify to the court that he believes that such action by the United States is of general importance and will materially further the vindication of rights, privileges and immunities secured or protected by the Constitution or laws of the Congress.

In conclusion, we support the efforts of Congress to pass legislation to enforce the rights of institutionalized persons, but we urge you to delete those provisions which we believe will result in unnecessarily handicapping the very people whose rights you seek to protect.

I can comment on two questions which have come up and then I think we'll all be available for questions.

In terms of standards, I'd like to say that the cases reveal that the courts in coming to their conclusions and in fashioning relief look to the wide variety of standards that are presently available. They look to the State's own standards. They see if the States are complying with their own fire and safety codes, their life support codes, their building codes. They look to see of the States are complying with the standards that have already been established by the American Public Health Association and the Medical Association. Certainly, when the Federal standards are issued, the courts will look to those, too.

Furthermore, in addressing the point that's come up about overcrowding in institutions, which is a very serious problem in institutions throughout the country, we have found that in our litigation it is not necessary to wait 2 or 3 or 4 years until new institutions are built to solve this problem. In many of our cases, courts have ordered that classification procedures be instituted by the State to relieve overcrowding. This can be done very quickly and can enable the State to better use its own resources which currently exist. In many States, until the courts have intervened, officials have placed people in institutions simply on the basis of beds available in those institutions rather than by looking at each inmate who comes into the system and his or her particular needs for security and for programing. Courts have found that when these new classification procedures have been

implemented, the States have had a better opportunity to place prisoners in maximum, medium, and minimum security institutions and community programs; many States already have provisions for work release and education release, but are simply not using them because they don't have the mechanisms to place people in those programs which would relieve some of the burden on the institutions in a less costly and speedier manner than building.

Mr. KASTENMEIER. Thank you, Ms. Weisenberg.

I'd like to congratulate all three witnesses for your presentations this morning. I'm going to yield to my colleagues for questions. I do have one question for clarification I want to ask Mr. Marlin, and that is with regard to the reach of the bill with reference to private nursing homes. Do I understand you to say you're satisfied with the colloquy you have heard and the discussion of State action in Mr. Days' explanation of what he believes to be the coverage of the bill itself? Are you satisfied that its reach is adequate for the purposes you expect it to cover?

Mr. MARLIN. Well, I wouldn't want to go so far as to say I was satisfied because I disagree with Mr. Days' response to the first question that was asked him by Mr. Moorhead, which was: Do you think the reach of the bill goes to private nursing homes; and I believe his response was no. He then went on and I thought qualified that, or perhaps reversed that, by suggesting that there were conditions on a case-by-case approach that would indicate that a private nursing home would be covered. So it is the latter comment I'm satisfied with. That is the position that we feel is appropriate. We believe the bill's coverage would extend to private nursing homes.

Mr. KASTENMEIER. In certain cases. The reason I follow this line of questioning is because your testimony was very explicit and enlightening with respect to the number of elderly in nursing homes, yet the general proposition is that the bill does not extend to private nursing homes except when State action is involved.

Would you not agree?

Mr. MARLIN. I would not, Mr. Chairman. I would not accept the proposition that the bill does not extend to private nursing homes. The bill doesn't say that. The bill defines institutions and included within the definition are nursing homes and homes that supply residential and custodial care. It seems to me that the development of the bill's coverage is a matter for the judiciary. I singled out what I thought was a key phrase which extended the coverage of the bill to private nursing homes. That is the phrase that relates to performing a service under contract because it seems to me that that permits the Attorney General and a court to consider a medicare or medicaid provider contract. That phrase is very important in making a judgment as to whether or not a suit would be appropriate and also very important for defining State action in that particular case.

So I would not agree with the proposition that the bill does not cover private nursing homes.

Mr. KASTENMEIER. Then it is your belief and hope that it generally covers nursing homes and perhaps the majority of nursing homes of the 23,000 in the country by virtue of medicare and medicaid contracts?

Mr. MARLIN. That's correct.

Mr. KASTENMEIER. I don't know that the committee would agree with you in that connection, but you would be free to litigate that point later on. And I don't make that statement in terms of what I would wish, but rather constraints we are operating under which are basically that we are talking about State institutions, State and local public institutions. I'm mindful that the reach might go beyond that in some cases, but the cases would probably be those in which the entity contracted with actually serves in lieu of the State rather than being brought in on other grounds—licensing or on the grounds of benefits.

However, the committee, of course, is free and probably will need to further clarify that point. I would certainly not want to quarrel with you on the merits of what you would hope that the bill would include, but rather what I think is an apprehension that the committee has and Congress has about the overreach of Federal legislation as far as Federal involvement with what have initially been private institutions.

Mr. MARLIN. I wonder, Mr. Chairman, if I could be permitted to state very briefly a hypothetical situation, one not unreal. Take a chain of nursing homes within a State, let's say six facilities, in which 98 or 100 percent of the revenues into that nursing home chain come from medicaid contracts. I would state also that the nursing home is quite profitable to the ownership and is operated for that purpose; that it complies with a series of Federal and State regulations as to the quality of care provided; that the State further has a patients' bill of rights which creates certain responsibilities of the home's operators and provides corollary rights for the patients.

In a situation like that, it would seem to me, if there were widespread abuses of the most flagrant kind, such as the record contains from previous hearings, that the combination of the State provider contracts, the substantial State and Federal financial resources that flow into the home, the regulatory scheme and perhaps the assignment and referral of patients by a State agency into the homes, might be the kind of a condition where, if unrectified elsewhere, the Department of Justice might want to initiate pattern and practice injuncture action, as it has dones for institutions in which mental patients or mentally retarded patients are housed.

So it's that kind of a factual situation that I would envision would give rise to action, not an individual home or an isolated abuse.

Mr. KASTENMEIER. Well, as I say, the committee will have to confront that question more explicitly I think. It might be more convenient not to, but I think we need to because it is a question of whether, of the 23,000 so-called private nursing homes, few are covered or many are covered, and whether 1 million citizens may be covered or just a minimum number of them.

At this point I'd like to yield to the gentleman from California.

Mr. DANIELSON. Thank you, Mr. Chairman. I want to touch on two things. One, I want to thank each of you for your presentation—very useful, very interesting, and it seemed like I've heard some of it before, maybe 2 years ago. You were all here with alter egos at that time. But I do thank you. It was well done and induced even me to stay to 1:20.

On your part, Mr. Marlin, and the colloquy with the chairman, I'm going to request that you get out your pad and pencil and draft a proposed modification or amendment which would achieve the purpose that you seek in bringing in your nursing homes. I do not, by that request, imply or represent that I would necessarily support it, but I think we should have it for the consideration of the subcommittee. I'm one person who feels that in drafting legislation we should leave as few things to construction as possible. I don't think the courts want to construe a law to include something that the Congress did not intend to bring in there or to construe something out. If we say we are to cover nursing homes of the type you're talking about, I think we just say it in so many words or otherwise not say it. So if you would help us out by saying it, we can consider that when we reach markup.

I assure you that I will bring it up for consideration.

Mr. MARLIN. I'll do my best, sir.

Mr. KASTENMEIER. I'm certain that Mr. Marlin, whether or not such language is agreed to, would not reject his own interpretation or construction of that for purposes of a potential suit or trying to induce the Attorney General to initiate such a suit, because I think part of your answer was you think that the present language, plus the way you construe State action, that the nursing homes are covered; that really additional or amended language is not necessary.

Mr. MARLIN. I would also want to say this, Mr. Chairman, that if the present language became law without change and the interpretation which I have articulated is rejected, we would still strongly support the bill even if it only covered the eight percent of publicly owned and operated nursing homes. The bill's reach and extent goes beyond that and we are very much approving of it.

Mr. KASTENMEIER. I understand and I appreciate that, and if you care to amplify, as suggested by Mr. Danielson, we would appreciate that as well.

I yield to Mr. Gudger.

Mr. GUDGER. Mr. Chairman, I would like to expand on the question that has been developed by the gentleman from California. Some of our States have a structure called a rest home which, as distinguished from a nursing home, does not provide structured nursing care and frequently does not have a sustained medicare-medicaid contract. Therefore, they are dependent largely upon social security income, social service funds and that sort of thing. These institutions have grown up and are quite numerous. They are populated in my particular State by many people who are quite senile. They are still perhaps not receiving nursing or medical care on a sustained basis. Yet these very people would likely have been wards of the State, institutionalized by the State 20 years ago at Camp Butler-type facilities which housed those who were no longer capable of taking care of their own social needs.

What about them? Do you include them in the 23,000 that are listed in your testimony as the number of nursing homes in this country or are they excluded? I would think they are probably included because that would be around 1 for every 200 citizens, and yet they may present an entirely different legal problem in view of your comments and in view of your observations earlier.

Mr. MARLIN. I'm grateful that you brought that up, Congressman Gudger, because I had intended to talk about the residential and custodial homes which are included in the bill. I believe they are outside the 23,000 nursing homes. The portrait you paint of the North Carolina residential-custodial homes is a typical one and one of the reasons why residential and custodial care homes contain many persons who are mentally infirm, perhaps senile—and there's a great distinction between the two—has been the recent State operated and designed transfer programs around the country from mental hospitals into residential homes. This relocation effort has been aided and abetted in large measure by the enactment of Congress in 1972 of the supplemental security income program in which SSI payments are permissible to persons who reside in those homes, while they are not to persons who reside in the skilled and intermediate homes.

So it is another example of where by contract there may be a massive infusion of Federal funding going into private homes. My interpretation, and certainly my hope, as to the coverage of the bill would be the same for them as it would be for nursing homes. There is the same contractual and financial nexus in those homes as there is in more advanced skilled nursing care homes.

Mr. GUDGER. Thank you very much for that explanation.

I wanted to thank the other two witnesses and I look forward to addressing some questions to them in the future, probably in the form of correspondence. They have left me with many questions I'd like to have answered, but I don't think we'll undertake to present them today.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. That concludes this morning's hearings and I join my colleagues in expressing my appreciation to the three of you and to Mr. Days as well for your testimony this morning, and I do wish to announce that tomorrow morning we will have testimony from the National Association of State Mental Health Program Directors as well as the Public Advocate of the State of New Jersey, Mr. Van Ness, at 9:30 tomorrow morning in this room. Until that time, we stand adjourned.

[Whereupon, at 1:25 p.m., the hearing was recessed, to be reconvened at 9:30 a.m., Thursday, February 15, 1979.]

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

THURSDAY, FEBRUARY 15, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mikva, Gudger, and Moorhead.

Also present: Timothy A Boggs, professional staff member, Gail Higgins Fogarty, counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

Today the Subcommittee on Courts, Civil Liberties and the Administration of Justice will conduct the second day of hearings on H.R. 10, a bill to protect the Federal rights of institutionalized persons. These hearings should be viewed as a supplement to the 5 days of hearings which we held in the last Congress on predecessor bills H.R. 2439 and H.R. 9400.

Yesterday we heard testimony supporting the legislation from representatives of the U.S. Justice Department, of the mentally disabled, elderly and prisoners, and it was a very productive hearing.

Today we will hear from two witnesses, each a State official. One is opposed to this legislation and one supports it. I think it's appropriate to hear from such officials or representatives of such officials.

I'd like to note for the record that the subcommittee did invite the National Association of State Attorneys General to testify today. Last Congress they were the main opposition to the legislation. However, they were unable to send a representative to address this issue, although I understand from their latest resolution that they still oppose the legislation.

It is important to note that the subcommittee adopted some of the recommendations for changes that were proposed by that association in the past and we indeed may have reason to meet with them again in terms of the legislation.

Our witnesses today are, first, Mr. Alan E. Grischke, Chief Counsel and Manager, Division of Legal Services, Department of Mental Health and Development Disabilities from the State of Illinois; and second, Laura LeWinn, the Deputy Director, Division of Mental Health Advocacy, Office of Public Advocate, State of New Jersey.

Mr. Grischke will be the first witness this morning and he's here in his capacity as the representative of the National Association of State Mental Health Program Directors. You are indeed welcome, Mr. Grischke, and perhaps you would like to identify your colleagues.

TESTIMONY OF ALAN E. GRISCHKE, NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS, ACCOMPANIED BY HARRY C. SCHNIBBE, EXECUTIVE DIRECTOR; AND KATHERINE FREEMAN, STAFF ASSISTANT

Mr. GRISCHKE. Thank you, Mr. Chairman. On my right is Mr. Harry Schnibbe, who is the executive director of the National Association of State Mental Health Program Directors; and on my left is Ms. Katherine Freeman, who is the legal liaison and a staff person for the national association.

I think some further clarification might be necessary. The National Association of State Mental Health Program Directors is an organization composed of the directors of all State mental disability programs. They have a national office here in Washington and they meet at least twice a year as a body. They are again the directors of the State programs, so they have a common interest and goal. I am here to represent that organization per se in my capacity as chairman of the legal group which relates directly to our parent organization. The Association of State Mental Health Attorneys is comprised of the attorneys representing the mental health programs in each of the 50 States. That would be the only capacity to which I would be testifying today.

I am the chief counsel or general counsel to the Illinois Department of Mental Health. I am not testifying in that particular capacity. I am also a special assistant to the Illinois attorney general, but I am not testifying in that capacity. I am currently teaching both law school and medical school in the area of law and psychiatry, and I'm not here under those capacities either. So it's strictly——

Mr. KASTENMEIER. At which institution do you teach?

Mr. GRISCHKE. I'm teaching law school at the John Marshall School of Law to the third year students. I'm teaching law and psychiatry at the University of Illinois Abraham Lincoln School of Medicine to the third year psychiatric residents.

So, as you can see, the legal implications now are getting to be such that in the medical school program the enrollment exceeds the amount of class space available because the legal issues are in fact coming into the medical field, especially the psychiatric field at this particular point in time to the extent that added intervention seems to be necessary, that is added classes seems to be necessary.

Therefore, Mr. Chairman and members of the committee, on behalf of the National Association of State Mental Health Program Directors. I thank you for the opportunity to present our viewpoint.

Although our view given here today at first blush might seem somewhat akin to the opposition of motherhood when looking to the background of this bill, we hope to establish there's another way to credibly view H.R. 10 and that is our purpose here today.

The National Association of State Mental Health Program Directors opposes the enactment of H.R. 10 into Federal law. At the same time,

the association supports the objectives of the proposed legislation; that is, to assure the rights of persons confined to mental hospitals, nursing homes, prisons and facilities for juveniles and the handicapped.

We oppose the bill on the grounds that it's the wrong approach to solving the problems of institutionalized persons. Enacting H.R. 10 into law would mean the health policy in this country would begin to be determined by the criminal justice system as opposed to the legislative or executive branches of government.

The 50 State government mental disability agencies at this moment are engaged in hundreds of Federal district court patients' rights cases initiated by parties other than the Federal Government. The normal litigation process is working well in the country today.

Intrusion of the U.S. Department of Justice into the present system of health policy determination is totally superfluous and serves no purpose except to compound legal work and overload court calendars.

Consequently, this association supports the alternative proposed by the National Association of Attorney's General: that is, that a Presidential commission be established, with members from the ranks of State and Federal government leaders, civil liberties groups, and other interested citizens, to study the issues involved in the care of institutionalized persons in local, State and Federal institutions and to recommend improvements in the operation of the institutions, including the drafting of proposed minimum standards of care.

If, on the other hand, the NAAG proposal is not accepted, and H.R. 10 is to continue to be considered in this subcommittee, we respectfully recommend nine amendments as indicated in the attached marked up version of H.R. 10.

I will describe, Mr. Chairman, several of our more substantive amendments. We would ask that the Federal Government, if planning to initiate a suit against a State government mental health agency, be required to demonstrate that it is coming into court with "clean hands." It is only equitable that the energies of the Justice Department be directed first to assuring that unconstitutional conditions do not exist in facilities directly operated by the Federal Government.

Our proposed amendment would be:

Section 3(c). No such certification shall be made by the Attorney General if he has reasonable cause to believe that the United States, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with the United States, is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.

All institutionalized persons, not just those persons residing in a State owned, operated, or contracted facility, should be protected against deprivation of constitutional rights.

In recognition that the right to equal protection under the law applies to persons residing in private, as well as public, facilities, all language which limits this legislation to facilities owned, operated, or managed by a "State or political subdivision of a State" should be deleted.

Prior to "intervention" in an action, the U.S. Attorney General should be required to follow the same certification procedures as proposed in section 3 of H.R. 10.

This concept has already been endorsed in the companion bill in the Senate and would prevent the Department of Justice from circumventing the requirements of section 3 by intervening in lawsuits previously filed or cooperating with legal services or other attorneys who are already litigating on behalf of institutionalized persons.

The Attorney General should be required to certify that he has endeavored to eliminate the conditions which deprive rights through informal methods of conference, conciliation, or persuasion and that these conditions cannot be remedied by voluntary means.

This language is derived from titles VI and VII of the Civil Rights Act of 1964 which prohibits racial and other discrimination in the utilization of Federal financial assistance and in employment. We believe that complementary preconditions to the Attorney General's suit to vindicate the rights of institutionalized persons are both wise and appropriate.

The U.S. Attorney General should be required to make a good faith effort to consult with the State regarding available technical and financial assistance.

The greatest impediment to improving institutional conditions is the scarcity of funds. The U.S. Attorney General should be required to assist the States in identifying available funds and other technical assistance.

Thank you for your courtesy today, Mr. Chairman, and it is our hope that your committee will be able to give our amendments consideration.

[Complete statement follows:]

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NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS

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Statement By

NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS

on

HR 10

A bill to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

February 15, 1979

Presented to

HOUSE JUDICIARY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

by

Alan E. Grischke, LL.B.
Chief Counsel and Manager, Division of Legal Svcs.
Dept. of Mental Health and Developmental Disabilities
State of Illinois
and
Chairman
NASMHPD Division of State Mental Health Attorneys

43-285 O - 79 - 5

Statement By

NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS

on

"Institutions Bill" -- HR 10, S 10

February 15, 1979

by

Alan E. Grischke, LL.B.
Chief Counsel and Manager, Div. of Legal Svcs.
Dept. of Mental Health and Developmental Disabilities
State of Illinois
and
Chairman
NASMHPD Division of State Mental Health Attorneys

MR. CHAIRMAN

The National Association of State Mental Health Program Directors opposes the enactment of HR 10 into federal law.

At the same time NASMHPD supports the objectives of the proposed legislation, that is to assure the rights of persons confined to mental hospitals, nursing homes, prisons, and facilities for juveniles and the handicapped.

We oppose the bill on the grounds that it is the wrong approach to solving the problems of institutionalized persons.

Enacting HR 10 into law would mean that health policy in this country would begin to be determined by the federal criminal justice system.

The 50 state government mental disability agencies at this moment are engaged in hundreds of federal district court patients' rights cases, initiated by parties other than the federal government.

The normal litigation process is working well.

Intrusion of the U.S. Dept. of Justice into the present system of health policy determination is totally superfluous and serves no purpose except to compound legal work and overload court calendars.

Consequently, this Association supports the alternative proposed by the National Association of Attorneys General: i.e.,

- That a Presidential Commission be established, with members from the ranks of state and federal government leaders, civil liberties groups, and other interested citizens, to study the issues involved in the care of institutionalized persons in local, state and federal institutions and to recommend improvements in the operation of the institutions, including the drafting of proposed minimum standards of care.

If, on the other hand, the NAAG proposal is not accepted and HR 10 is to continue to be considered in this subcommittee, we respectfully recommend nine amendments as indicated in the attached marked-up version of HR 10.

I will describe, Mr. Chairman, several of our more substantive amendments:

NASMHPD AMENDMENT #8 a new paragraph "(c)" on p. 5

We ask that the federal government, if planning to initiate a suit against a state government mental health agency, be required to demonstrate that it is coming into court with "clean hands" (as opposed to the example of inaction described in the Aug. 3, 1978 "Legal Issues" bulletin attached).

It is only equitable that the energies of the Justice Department be directed first to assuring that unconstitutional conditions do not exist in facilities directly operated by the federal government.

Our proposed amendment would be:

"SEC 3(c) No such certification shall be made by the Attorney General if he has reasonable csuse to believe that the United States, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with the United States, is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of sny rights, privileges, or immunities secured by the Constitution or laws of the United States, snd that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities."

NASMHPD AMENDMENTS #1,2,3,4,5

All institutionalized persons, not just those persons residing in a state owned, operated, or contracted facility, should be protected against deprivation of constitutional rights.

In recognition that the right to equal protection under the law applies to persons residing in private, as well as public, facilities, all language which limits this legislation to facilities owned, operated, or managed by a "State or political subdivision of a

State" should be deleted.

NASMHPD AMENDMENT # 9 on p. 5

Prior to "intervention" in an action, the U.S. Attorney General should be required to follow the same certification procedures as proposed in Sec. 3 of HR 10.

This concept has already been endorsed in the companion bill in the Senate and would prevent the Department of Justice from circumventing the requirements of Sec. 3 by intervening in lawsuits previously filed or cooperating with legal services or other attorneys who are already litigating on behalf of institutionalized persons.

NASMHPD AMENDMENT # 7 on p. 5

The Attorney General should be required to certify that he has endeavored to eliminate the conditions which deprive rights through informal methods of conference, conciliation or persuasion and that these conditions cannot be remedied by voluntary means.

This language is derived from Titles VI and VII of the Civil Rights Act of 1964 which prohibits racial and other discrimination in the utilization of federal financial assistance and in employment. We believe that complementary preconditions to the Attorney General's suit to vindicate the rights of institutionalized persons are both wise and appropriate.

NASMHPD AMENDMENT # 6 on p. 4 & 5

The U.S. Attorney General should be required to make a good faith effort to consult with the state regarding available technical and financial assistance.

The greatest impediment to improving institutional conditions is the scarcity of funds. The U.S. Attorney General should be required to assist the states in identifying available funds and other technical assistance.

Thank you for your courtesy today, Mr. Chairman, and it is our hope that your committee will be able to give our amendments consideration.

96TH CONGRESS
1ST SESSION

H. R. 10

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 15, 1979

Mr. KASTENMEIER (for himself, and Mr. RODINO, Mr. EDWARDS of California, Mr. CONYERS, Mr. DANIELSON, Mr. DRINAN, Ms. HOLTZMAN, Mr. MAZZOLI, Mr. HARRIS, Mr. HUGHES and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(1) the term "institution" means any facility or institution—

(A) ~~which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with, any State or political subdivision of a State; and~~

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

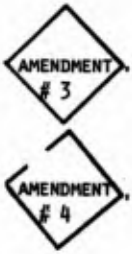
(iii) a pretrial detention facility;

(iv) for juveniles held awaiting trial or residing for purposes of receiving care or treatment or for any other State purpose; or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;

(2) the term "person" means an individual, a trust or estate, a partnership, an association, or a corporation; and

(3) ~~the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.~~



SEC. 2. Whenever the Attorney General has reasonable cause to believe that ~~any State or political subdivision of a State~~ *any institution*, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with ~~a State or political subdivision of a State~~ *an institution* is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available to persons residing in an institution as defined in paragraph (1)(B)(ii) of the first section of this Act only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States. The Attorney General shall sign the complaint in such action.

SEC. 3. (a) At the time of the commencement of an action under section 2 of this Act, the Attorney General shall certify to the court—

(1) that, at least thirty days previously, he has notified in writing the ~~Governor or~~ chief executive officer ~~and attorney general or chief legal officer of the appropriate State or political subdivision of the State~~ and the director of the institution of—

(A) the alleged pattern or practice of deprivations of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;

(B) the supporting facts giving rise to the alleged pattern or practice of deprivations, including the dates or time period during which the alleged pattern or practice of deprivations occurred and, when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged pattern or practice of deprivations; and

(C) the measures which he believes may remedy the alleged pattern or practice of deprivations;

(2) that he or his designee has made a reasonable effort to consult with the ~~Governor or~~ chief executive officer ~~and attorney general or chief legal officer of the~~

~~appropriate State or political subdivision~~ and the director of the institution, or their designees, regarding ~~assistance~~ *financial and technical assistance* which may be available from the United States and which he believes may assist in the correction of such pattern or practice of deprivations;

AMENDMENT # 7
Add New Paragraph "(3)"

"(3) that he has endeavored to eliminate the alleged conditions and pattern or practice of resistance by informal methods;"

(4)~~(3)~~ that he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such deprivations and have not adequately done so; and

(5)~~(4)~~ that he believes that such an action by the United States is of general public importance and will materially further the vindication of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be signed by him.

AMENDMENT # 8
Add New Paragraph "(c)"

"(c) No such certification shall be made by the Attorney General if he has reasonable cause to believe that the United States, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with the United States, is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities."

5 (a)

SEC 4 -- INTERVENTION

We ask that the same language be adopted as in Sec 3 (as amended), to insure that the same certification procedures are required prior to "intervening" in an action as are required in this bill prior to "initiating" an action.

SEC. ~~4~~ 5. (a) No later than one hundred and eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections, promulgate minimum standards relating to the development and implementation of a plain, speedy, and effective system for the resolution of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility. The Attorney General

shall submit such proposed standards for publication in the Federal Register in conformity with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after such publication unless, within such period, either House of the Congress adopts a resolution of disapproval. The minimum standards shall provide—

(1) for an advisory role for employees and inmates of correctional institutions (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system;

(2) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(3) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(4) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance;

(5) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(b) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolu-

tion of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility, which may be submitted by the various States and political subdivisions in order to determine if such systems are in substantial compliance with the minimum standards promulgated pursuant to this section. The Attorney General may suspend or withdraw such certification at any time if he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated pursuant to this section.

(c) In any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult individual confined in any jail, prison, or other correctional facility, or pretrial detention facility, the court shall continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice, except that such exhaustion shall not be required unless the Attorney General has certified or the court has determined that such administrative remedy is in substantial compliance with the minimum acceptable standards promulgated pursuant to this section.

SEC. 5. The Attorney General shall include in his report to Congress on the business of the Department of Justice

prepared pursuant to section 522 of title 28, United States Code—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act;

(2) a detailed explanation of the process by which the Department of Justice has received, reviewed, and evaluated any petitions or complaints regarding conditions in prisons, jails, or other correctional facilities, and an assessment of any special problems or costs of such process, and, if appropriate, recommendations for statutory changes necessary to improve such process; and

(3) a statement of the nature and effect of the standards promulgated pursuant to section 4 of this Act, including an assessment of the impact which such standards have had on the workload of the United States courts and the quality of grievance resolution within jails, prisons, and other correctional facilities, and pretrial detention facilities.

O

LEGAL ISSUES

MENTAL HEALTH
•
DEVELOPMENTAL DISABILITIES
•
ALCOHOLISM
•
DRUG ADDICTION

FEDERAL GOVERNMENT, BIG ON PUSHING STATES, FLOPS IN ITS OWN BACKYARD

"NO PROGRESS SINCE 1975"
SAYS DEINSTITUTIONALIZATION SUIT AGAINST HEW

Legal action seeks to enjoin Secretary Califano from spending $55,000,000 on "renovation" of 2,300 bed St. Elizabeths Hospital

Another claim in suit: HEW is by-passing its own "health planning guidelines"; ignoring certificate of need process in "proposing to sink $55 million in a deteriorating institution".

Harry C. Schnibbe
Executive Director

1001 Third St., S. W., Washington, D. C. 20024 Phone 554-7807

NATIONAL ASSOCIATION STATE DIRECTORS

Finding Homes for Residents of Mental Institutions

Washington Star- Monday July 31, 1978

ST. E'S PATIENTS SUE FOR PLACEMENT IN THE COMMUNITY

By Robert Pear
Washington Star Staff Writer

Lawyers for patients at St. Elizabeths Hospital are going to court today to charge that the federal government and the D.C. Department of Human Resources have violated a 1975 court decree requiring the transfer of hundreds of hospital patients to foster homes, nursing homes and similar community settings.

"Despite considerable activity around the problems of deinstitutionalizing (patients), there have been few, if any, concrete accomplishments," the lawyers say in papers being filed in U.S. District Court.

As a result, they say, patients "are unnecessarily deprived of their civil liberties and the opportunity to reconstruct their lives in society."

Although eligible for placement in the community, "hundreds of patients remain in St. Elizabeths Hospital illegally and unnecessarily" because of "inaction" by the federal and District governments, the attorneys argue. There has been "almost no progress" since 1975, they say.

TIRED OF WAITING, they ask U.S. District Court Judge Aubrey E. Robinson Jr. to appoint a "special master" and an expert panel to devise a comprehensive plan for implementing his 1975 order. Such a plan, they say, is "long overdue."

The patients' attorneys also ask the court to enjoin the secretary of Health, Education and Welfare from spending federal funds on renovation of the 2,300-bed hospital.

HEW Secretary Joseph A. Califano Jr. has requested $55 million from Congress for that purpose, according to the attorneys, who say the money should be used instead to develop community-based facilities outside the hospital.

Today's legal briefs represent the latest attempt by patients to enforce a "right to treatment" in the least restrictive setting. Judges have declared such a right, but their intentions have been frustrated in cities like Washington where surveys show a shortage of nursing homes, personal care homes, foster homes and halfway houses.

ST. E'S

staff at St. Elizabeths Hospital estimated that 1,200 of the 2,400 in-patients, or nearly half, would be better off in less restrictive facilities.

An evaluation today would show about the same number of patients needing and waiting for placement in the community, the attorneys contend.

THE ATTORNEYS are with the Mental Health Law Project, a Washington-based public-interest organization funded primarily by private foudations to conduct test-case litigation on behalf of the mentally handicapped. The group has won a number of major cases in mental-health law.

Dr. Roger Peele, assistant superintendant of St. Elizabeths, acknowledged yesterday that there has been a "loss of momentum" in placing hospital patients in the community.

One of the few new initiatives is the Green Door, a psychiatric rehabilitation program based at All Souls Church, 16th and Harvard Streets NW. Started by two former staff members of the Mental Health Law Project, it provides services to 65 chronic patients and former mental patients.

St. Elizabeths Hospital, located in Southeast Washington, is run by the federal government. More than 80 percent of the patients are D.C. residents.

In 1975, Judge Robinson ruled that both HEW and DHR had violated federal law by failing to provide "suitable care and treatment under the least restrictive conditions."

He ordered the two to cooperate in implementing his order. But, according to lawyers with the Mental Heath Law Project, negotiations have broken down because HEW and DHR have "conflicting financial and political interests."

MARGARET F. EWING, a lawyer with the project, explained that the federal government picks up most of the cost while patients are in St. Elizabeths. But the District government must pay a large part of the cost for patients receiving care in the community. The city government, she said, is reluctant to assume this burden, which is sure to increase in the future.

In seeking $55 million for St. Elizabeths, Ewing said, HEW's real aim is to regain accreditation for the hospital so that it can be transferred to the District government. The hospital's unaccredited status is an embarrassment to HEW and to the National Institute of Mental Health, which operates the facility. Moreover, the District would not accept the hospital without accreditation.

Another goal of today's request, according to Ewing, is to force the federal government to adhere to its own health-planning guidelines, which emphasize community treatment facilities.

"By renovating the hospital before transferring its operation to the District government," she said, "Califano would affect an end-run around federal health-planning laws and local certificate-of-need laws. . . . Because it is made by HEW, the proposal to sink $55 million into a deteriorating mental institution in the Nation's Capital has never had to meet the health-planning criteria promulgated by HEW itself."

THE PURPOSE of health-planning and certificate-of-need laws is to ascertain the need for new construction before starting expensive projects. What's needed in Washington, according to the Mental Health Law Project, is more community care, not continuation of a full-size mental institution.

"They could close part of St. Elizabeths and put some of the money in the community," Ewing said. Alternatively, she said, wards at St. Elizabeths could be converted to another use such as nursing or foster care, with the staff retrained.

Mr. KASTENMEIER. Thank you, Mr. Grischke. We haven't had a chance to analyze your amendments individually, but I just want to look at them.

Is it fair to say that the group you're representing today, the State mental health program directors, are often placed in a conflict of interest situation in trying to defend State programs they direct and at the same time acting as an advocate for residents of State institutions which they direct?

Mr. GRISCHKE. I think under certain circumstances a conflict could exist. However, I think the people most able to take care of those situations are those very individuals. In fact, from my personal experience in the State of Illinois where we certainly do have plenty of litigation, civil rights actions, Federal suits, 1983 actions and class action suits, almost—well, on an ongoing basis, we are constantly in court. I found that one of the best methods to remedy the situation where legal aid organization per se come to use and talk to us about what the problems happen to be and we can solve many of those problems through the use of that very director who can make a telephone call or issue a directive—to rectify a situation.

We have eliminated massive amounts of litigation as opposed to, for the first time, finding out about litigation through the filing of a complaint and a summons and demanding that you appear in court on a certain date and time to defend your policies as opposed to having the chance to previously work those kinds of problems out which can be done administratively much more easily.

Mr. KASTENMEIER. I take it you have no objection to the fact that you're in 50 or more pieces of litigation presently—you don't object that individuals have somehow accessed themselves to the court in protecting mental health programs?

Mr. GRISCHKE. Certainly not.

Mr. KASTENMEIER. Wouldn't you prefer that they didn't have a right to bring such suits?

Mr. GRISCHKE. To what?

Mr. KASTENMEIER. If it were within your power, would you not prefer that they did not have standing to challenge the State programs at all?

Mr. GRISCHKE. Certainly not. In fact, it would take myself and my staff out of jobs probably. But, by the same token, I think that when things can't be worked out and there are those conditions where there is not a meeting of the minds as to what in fact is a constitutional right or an established right and what in fact is a procedure or policy that's being recommended that would in fact cripple the delivery of services in a given State, we certainly come to grips with that on an ongoing basis also, where the proposal is that mental institutions per se are bad and if you don't close your institutions we're going to sue you. On those grounds, I have certainly no objections—and all of the middle grounds and gray areas where we can't come to any agreements—but I found as we go along on many basic issues we have happened to agree with some of the very people that are considered to be adversaries and we are able to settle a lot of those problems by sitting down and talking about them and listening to their proposals and then dealing with our proposals, and we come out to either compromise agreements or settlements.

It's the number of other cases where we can't agree that we do go to court and litigate, and under those circumstances I think the court serves a very valuable function.

Mr. KASTENMEIER. Of course, you understand that the Justice Department is involved in a number of cases as amicus curiae, plaintiff-intervenor or some other status than in initiating the suit. Do you have any objection to their involvement in that regard?

Mr. GRISCHKE. It depends on the extent of the involvement, because one of the things that seems to be espoused is that the Justice Department is necessary in order to protect rights of given patients.

I would submit that perhaps maybe 15 years ago the Justice Department's intervention might have been necessary for the protection of rights of patients, before any kind of development took place. The last 15 years in the area of mental health law per se has seen more advancement than probably the preceding 300 years. As a result of that development, opposed to some of the preceding testimony, the system isn't working that badly. I think quite the contrary, that many major results are taking place without Federal intervention. In fact, most every right or proposed right that people are discussing today is under litigation in some State court or Federal court with or without the intervention of the Justice Department.

I think any of the States as they are revising their mental health codes are showing a great deal of improvement and progress without the need for that type of intervention.

For instance, Illinois, as of January 1, has a brand new mental health and developmental disabilities code. Within that are embodied a lot of things being complained about and as each code is developed a number of things are taking place—patient rights, lists of patients' rights, a special office of advocate and guardian. I think as the States are allowed to progress and as change takes place, that change is most definitely going forward in terms of working toward the benefit of those very patients.

Mr. KASTENMEIER. In this respect, of course, your conclusion flies in the face of a very large number of other witnesses, including the witnesses of yesterday, Mr. Friedman, Mental Law Health Project; Mr. Marlin, National Council for Senior Citizens, and others, who state that they cannot in fact handle on a voluntary basis the sort of litigation necessary to really vindicate the rights of persons in their particular constituencies, and they have asked for this legislation.

Now, of course, when you talk about 1983 cases, you're talking about individuals. You know the legislation proposed well enough to know that the Justice Department could only get involved in litigation of very special importance nationally and situations where there is a pattern or practice of abuse. So we are talking about very select cases. Those are the sort of cases which many of these organizations say they are not in a position to handle. They can't follow up in terms of compliance of possible court orders and so forth. And so they are saying that the present system don't work, as you say it does.

Mr. GRISCHKE. Well, Mr. Chairman, I think all we have to do under those circumstances is look to where the litigation is going. You're not finding an ongoing scheme of cases which are in fact substantiating that patients' rights should be deprived. In fact, each progressive case that comes along seems to say that rights are being expanded. The new

codes as they are coming into existence are showing that expansion of those rights.

By the same token, when the organizations are saying that they don't have adequate facilities to bring these actions and follow them through, I think that we should also look to the other side of the coin and see the people that represent the State entities that are being sued. As chairman of the organization of mental health attorneys for this country, I would say that the woefully inadequate and deficient side of the coin are those people that are defending the people who are being sued in these matters. You're dealing primarily with attorneys general representing the agencies. The places that do have in-house counsel, the in-house counsel is generally not empowered to represent their own agency. They can give advice and counsel but not go to court. So what you're finding in many cases is that you have a young assistant who is ill prepared to deal with the complex issues found in this very specialized area.

I think you're finding a specialization growing up, but that specialization is growing up on the other side. I'm saying that our organization is working to try and give the same rights to the departments which are providing the care and treatment. We are also trying to prevent more duplicity of litigation than is already in existence and trying not to divert as many funds or the time of staff to spend in court under a number of different areas where those people could be more effectively utilized by spending their time treating patients.

Mr. KASTENMEIER. Well, it seems to me you and your own group are perfectly articulate. As a matter of fact, not only these attorneys which you referred to but in fact the Attorneys General of the various States who feel that they should be in a position to defend the State programs, the State program directors, and, of course, that's one reason they oppose the legislation. So you do have institutions of competence enlisted in behalf of defending the status quo on the State level and I don't feel there has been a showing that you have been undermanned in that connection.

Mr. GRISCHKE. I think there is a difference, however, inasmuch as there are projects which are in existence in certain places which can avail themselves of their expertise in other States acting as a amicus in many of the major pieces of litigation that are taking place in the Federal system today. You find that the States don't have that same type of expertise available to act as amicus in these major cases. It's very rare to have amicus briefs filed on behalf of another State in defending the people that are the providers of care and treatment for the given State as opposed to people that are acting as amicus against those care providers.

Mr. KASTENMEIER. I would furthermore wonder whether the most economical use of resources is for these individuals to pursue cases through voluntary groups on an individual basis rather than to enlist the aid of the Justice Department to pursue cases where a practice is egregious and involves many persons. It seems to me that would be a far preferable way of resolving the basic difficulties rather than your suggestion. You seem to be saying that these individuals should somehow avail themselves of some sort of attorney resource at probably a voluntary level to pursue these cases on a one-by-one case basis.

Mr. GRISCHKE. Well, again, Mr. Chairman, in dealing with surveys, in dealing with the types of cases that are coming in across the country, I would just simply have to resubmit that the issues facing us and facing all the States are being litigated. They are being litigated on a constant basis. I'm not seeing any cases dropped because there's a lack of funds, and because the people bringing those actions are unable to carry those actions out because they don't have the financial resources to do so. In fact, from my perspective and the perspective of my counterparts across the country their resources seem rather unlimited to us as opposed to our own rather limited resources.

All of us I think on both sides of the fence could claim to be rather woefully underfunded and to divert additional funds strictly to meet some rather redundant legal challenges in many cases ties up that additional staff and those additional resources that should in fact be put in place to provide better and higher quality standards of care and treatment.

Mr. KASTENMEIER. There is another question that seems to be involved. In fact, I think in the last Congress it was the National Association of Coordinators of State Programs for the Retarded that stated that sometimes litigation is the only method that can accomplish change, and that very often State officials running the programs, while they end up being defendants, view the suit as a way of enabling them to get the attention of the legislatures that they do have problems in these institutions and need help. The litigation often serves to surface that question publicly and in fact by indirection perhaps serves the needs of even those in charge of the programs. Do you admit that?

Mr. GRISCHKE. I think that on a number of occasions instead of in fact accomplishing that, what has been accomplished is that institutions have been closed, and as a result of institutions being closed there's suddenly a scramble to find community placements for those patients who were at least having some of their needs met. The need to upgrade is uniform. I don't think this country is every going to meet all the needs of all the patients. There's always going to be some limitation of funds or services or staff. However, there is an attempt—and more than an attempt—there is an ongoing concern about the ongoing delivery of services to patients. To close facilities, to divert patients to areas that are ill-prepared to take care of them I think would be a very grievous mistake.

Also, I think the attention paid to the public sector has not been enough. In fact, talking about this bill, if it were to be applied equally to the private sector, is something that would have to be taken into account. New legislation such as Illinois' new health code applies equally to the public and private sector. When we look to the public sector, what we are talking about is the State institutions. There at least under rule and regulation you're dealing with a governing of restraint and uses of psychiotropic medication, the use of electric shock therapy, the use of lobotomies, and the private sector in the nursing homes, for example, they don't have that same type of regulation and the same type of scrutiny.

The impact right now is that deinstitutionalization is being pushed through current case law, if nothing else. Thirty percent of the 50 States' budgets is being placed for use in the community sector to try

and upgrade community services. I think that that is something that has to be taken into account when looking at litigation against many of the facilities. We're talking about upgrading, which is necessary in many cases, but by the same token, not trying to stress so much litigation that the facilities are going to be rebuilt where in fact the structure should be working more toward the community settings.

Mr. KASTENMEIER. Well, you raised the specter of closing institutions, and I consider that a problem. I would only conclude that it's less likely that if the Federal Government is a party that that would be the result. I know without the Federal Government being involved, that sometimes the remedies have been rather drastic and to a very great extent it is because there is no entity such as the Justice Department acting as a moderating force in the litigation. Pursuant to this bill, we mandate the Department to do a number of things, including—and I quote—

> That he (the Attorney General) or his designee has made a reasonable effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding assistance which may be available from the United States and which he believes may assist in the correction of such pattern or practice of deprivations.

Other litigants who proceed against public institutions in the States are not bound by such requirements, and sometimes the remedies they seek are more drastic, but I submit that if the Justice Department is a party that it's less likely that you will have a drastic remedy. It's more likely you will have one worked out than would otherwise be the case.

Mr. GRISCHKE. Well, I would have to respectfully disagree to a certain extent with you there, Mr. Chairman. In one of the most recent cases filed in New Hampshire, *Garrity* v. *Thompson*, part of the asked-for relief is the closing of one of the facilities because it was considered by the plaintiffs to be unconstitutional to put mentally retarded people in a structured environment as opposed to working them into community placement, and one of the asked-for points in relief was to literally get rid of that facility. The Justice Department is pushing to intervene in that suit. If they intervened that would be one of the requested-for, asked-for grounds of relief and as a result that new piece of litigation is showing in fact that very result may be accomplished or at least asked for by the Justice Department.

Mr. KASTENMEIER. Well, that's somewhat different from achieving that or having that as an end. As I say, I'm also interested in your suggestion that we do apply this bill to private facilities. That has been suggested by other persons and certainly it would precipitate a great deal more litigation than we presently contemplate, but nonetheless that might be a step in the right direction.

I yield to the gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. I see considerable merit in what your comments have raised by way of the progress achieved in recent years. I have seen my own State develop a patients' bill of rights so that each inmate of an institution is assured opportunity for unimpaired communication, to counseling, and advocacy. I have a pretty good concept of what the Illinois code presents in this same area and I'm aware that it makes provision both for the public and the private institutionalized persons.

Typically, a State function, that is to administer those rights against the inmates or the patients confined to the private institutions, don't you see, though, that there is a constitutional basis for a different treatment of the State institutions from the private institutions? Let me phrase it a little bit differently.

First, the State institution is to have its representation from the State's attorney general. Seeond, the 14th amendment would impose upon the State a burden of providing for the constitutional protections and equal rights of their citizens to assure them that they have certain protections that perhaps might not be regulated from the Attorney General's Office here but might properly be within the province of the legislatures of the several States, vis-a-vis internal affairs and enforcement by their attorney general against private institutions.

You do see a valid distinction here, do you not?

Mr. GRISCHKE. With regard to rights, a have a problem distinguishing because if there's a right in one spot I don't think that the "right" should be able to be deprived in another sector.

I think one of the problems we've got with dealing with this bill is that as opposed to enforeing established rights which are rights determined by the U.S. Supreme Court, the Justice Department has illustrated somewhat of a greater interest in the creation of new constitutional rights through this type of litigation. I don't feel that the Justice Department is the best agency for formulating social and health policy changes. It doesn't take into account the legislative and exeeutive branehes.

Now when a right is determined to be a right, I think it's entitled to proteetion regardless of where serviees are being provided and delivered. Now the State has always had and always will have more watchdog-type of procedures around it. That's why I think rules and regulations have been developed that——

Mr. GUDGER. Let me ask you this. Do you think an inmate should have some due process protection or resort to the courts to question his having received a eure and being entitled to a diseharge?

Mr. GRISCHKE. If in fact they are being held beyond the time that they have received a eure; in other words, that they no longed need mental treatment, putting it in those terms.

Mr. GUDGER. Do you think the patient should have some ability to have a due process hearing within reasonably short periodic times to determine whether or not he requires continued care and treatment?

Mr. GRISCHKE. I think that a review is indeed necessary, yes; that there shouldn't be indeterminate periods of hospitalization without any kind of review because that could ultimately involve nothing short of preventive detention.

Mr. GUDGER. Do you conceive that a failure on the part of a State to make provision for such periodic review and for a sound pattern of advocacy would invade a constitutional right?

Mr. GRISCHKE. It eould possibly. Now there hasn't been any dealing with rights to treatment, for instanee, whieh is the nomenclature of the day. The Supreme Court still hasn't dealt with that. Numerous States have implicit in their eodes that there is in fact in that State a right to treatment. Many people are going on the assumption that there is aeross the board such a right. I personally don't believe in anyone being held in a hospital against their will, to be

provided with treatment or not, to be held there unless they were in need of treatment. It would be somewhat inappropriate.

We have just finished completing a survey for the National Institute of Mental Health which does an across-the-board correlation of what in fact is taking place in each of the various States. That survey will be completed hopefully within the next couple of months. It's a basic survey of all the States' mental health codes and commitment criteria, patients' rights in the various States, the voluntary admission status, the discharge status, the rights of review. I could give you certain statistical background now, but I might be jumping ahead of myself until all the facts are in, but I can guarantee that we will have that done and I would be more than happy to see that such a report would be circulated.

Mr. GUDGER. You have mentioned progress having been realized in the field of mental health care and treatment and I certainly am aware of a great deal of progress in my own State of North Carolina as we develop the mental health centers, the outpatient care, and have gotten away from the institutionalized experience and have reduced periods of hospitalization from an average of perhaps 10 years ago of 4 years down to perhaps 6 or 8 months. So we have seen a great deal of progress throughout the Union I'm sure.

But don't you concede that there is a great deal of disparity between States in the practice of modern treatment in this field?

Mr. GRISCHKE. I would say that there is most definitely across the country differences with regard to standards of care and treatment, with regard to resources being available, but what I was trying to say before is that every time a new mental health code is enacted we are seeing massive changes that are taking place on the States' own initiative. Every time another lawsuit is taken into account there are certain changes procedurally that have to be taken into account in the various States and, in fact, there is more interest being generated in this field today because it is one of such rapid movement.

I'm finding personally that, for instance, the law school classes 5 years ago, a class in law and psychiatry or mental health law probably wouldn't have been attended by anybody or people would have wondered what it was or it would have been a novel course to get involved in, whereas at this point in time out of the seven law schools in the Metropolitan Chicago area as it were, five of them are teaching rather active courses in this area. My own classes over the last 3 years have had enrollments that have been swelling at the seams basically because this is an area of very, very rapid growth. I don't see any other areas in the law that are expanding quite as rapidly with as many people being interested in getting in on "the ground floor" something that they still have a chance to deal with where rights are being expanded and it's altogether in that direction. It's not going in terms of depriving people of rights. Everything that seems to be taking place across the country today is dealing with that expansion and that is with or without the intervention of the Justice Department.

Mr. GUDGER. One other question and I'll be done. I'm rather surprised that in your list of proposed amendments you have not advocated a certification by the Attorney General of a compliance with minimum standards of procedure vis-a-vis mental health institutions similar to what has been proposed here with respect to correctional institutions.

You're aware that section 4 does make a provision whereby the States if they have adopted inmate griveance procedures of a quality acceptable to the basic standards to be developed by the Attorney General would be subject to a different treatment from those which have not.

Do you believe that this bill is unfair in not allowing a similar process of procedure to develop with respect with the mental health institutions?

Mr. GRISCHKE. That's a very good point, sir, and I'll have to admit that that would—I agree with that concept. I didn't suggest it per se in this bill, but—I think I'll just simply have to confess to not having included that, and I would certainly agree with the concept.

Mr. GUDGER. Lacking any certification process, the burden upon the Attorney General in establishing a case of abuse against a mental health treatment system of a State would have to meet this very broad standard of definition in section 2 which would probably be of a far heavier burden than the burden to be imposed with respect to correctional institutions. Wouldn't you agree to that?

Mr. GRISCHKE. Not necessarily. We are dealing with two different types of systems obviously, but the—well, there is somewhat of a difference, with regard to their certification process.

Mr. GUDGER. And since there is such a difference, doesn't it impress you that probably the chairman has correctly assessed the impact of this bill in the mental health field in that it does impose a heavy burden upon the Attorney General to exercise these processes of communications with the Governor and demonstrating an opportunity to the State to conform?

Mr. GRISCHKE. It imposes a burden, however, we don't feel that this burden—we feel that the amendments that we have proposed would, if in fact this bill were to pass, the amendments we have proposed we feel are going to be necessary in order to adequately place the burden where it belongs and to adequately assure that certain procedural safeguards are met before allowing intervention to allow what could amount to just duplicity of litigation causing more and more time and efforts to be spent in court when in fact they should be spent in treating patients.

Mr. GUDGER. Mr. Chairman, I want to thank Mr. Grischke for his very enlightening comments and for his very analytical approach to this bill. I think it's very helpful when a witness comes up with proposed amendments and direct treatment of the bill itself rather than just commenting in general terms and I want to express my personal appreciation for his very informative testimony.

Mr. KASTENMEIER. I thank my colleague and I do agree that Mr. Grischke has demonstrated through his able presentation that the State mental health program directors must not worry about underrepresentation. But I continue to fail to see why your organization remains so opposed to H.R. 10. You have heard the testimony of the Department of Justice. They are presently in about 40 cases in the country in a status less than initiation—amicus curaie or some sort of intervening status. I assume only a few of those are mental health cases. They are in prisoner cases, other classifications than mental health programs, and in their testimony they have said that they intend to target the most egregious cases in America at a level not noticeably higher than it presently is. In fact, I think they intend to hire two more attorneys.

What I'm suggesting is that the anticipated level, if this passes, of the Justice Department's involvement in the field will still be somewhat minimal. Why one should feel that targeting the most egregious cases—pattern and practices—is an evil thing that should be avoided and that some other means ought to be used to address those cases I really don't quite understand.

Mr. GRISCHKE. Well, my basic comment is that as opposed to trying to enforce again established rights, it seems to be an ongoing province of the Justice Department to try and create new rights, to deal with carrying out further litigation in areas that are under litigation in each of the various States whereby more time and effort is required in order to just meet these further demands of the further resources so more State dollars are, of necessity, going to be spent on the litigation as opposed to being spent on something else.

Now, the cases that I'm most familiar with are the ones where the various States are asking for people out of my association for the first time that have some expertise in dealing with—attorneys that represent the larger States such as myself, such as the attorney from New York—to come in and spend time with them to help them establish litigation units, to meet the demand of people who have created some sort of expertise in this field. By doing that, what we are setting up are litigation units that are going to be costing more and more dollars, bringing in expert witnesses from outside of the States, and in many of these cases the only result is that we are expanding upon the litigation, drawing it out, and costing more money. I think that money would be more wisely spent on taking care of patients because I think the States have shown that on the overall picture they are working very definitely in one direction on their own and have been for the past 15 or 20 years, and they are gradually moving forward.

Mr. KASTENMEIER. Well, as you pointed out, we are in an unstable or at least an active situation with respect to new laws and codes being adopted, and the law itself being perfected, essentially by the courts themselves, with the aid, of course, of litigants, but I don't really see that the Justice Department's role in that respect is going to complicate matters any further. In fact, it should—certainly this subcommittee would hope—it would help define the most important cases, and help define what are these rights and what are not these rights, rather than to allow these to willy-nilly be developed in terms of case law by a casual case here and there by voluntary groups or any other individual basis.

I agree there would be a great pressure and responsibility on the part of lawyers representing State mental programs to respond and to help define what can be regarded as rights, but I think that will come about in any event, and I would think the Justice Department's role, far from duplicating it, would tend to merge those questions, so that fewer cases would be more decisive than a larger number of them.

Mr. GRISCHKE. Well, Mr. Chairman, I think that one of our proposals or one of the proposed amendments deals with how we would see the utilization of the Justice Department and that would be through the use of informal meetings, through the use of requirements prior to filing suit, asking and enlisting the aid of the Justice Department with Federal assistance and with their Federal expertise in dealing with problems that are perhaps in existence, it would be an excellent way to

utilize their expertise and resources to aid us rather than—to aid us in dealing with certain problems that we may have problems with, with rather debilitating State resources, to accomplish any types of needed change for the patients' benefit.

Now, the use of them for patient benefit as opposed to patient detriment, through the use of taking money damages or spending a lot of additional time in litigation as opposed to informal meetings or preconditions to litigation, which I think would be a very, very necessary factor for us.

Mr. KASTENMEIER. Thank you. I would like to discuss the suggestion that there be another Presidential Commission created and established. We of course, have just had within the last 6 months a report of the President's Commission on Mental Health. Of course, you are well aware of that, and the task panel that had some collateral material before it made a recommendation endorsing legislation which would give the U.S. Department of Justice standing to litigate on behalf of mentally impaired persons where civil or constitutional rights have been violated. I do not believe that another commission is necessary to review these matters.

Mr. GRISCHKE. Well, I think again we are dealing with an area that is definitely in a state of flux and change. Being a member of at least three Governor's commissions as the present time to aid in the revision of their State mental health laws, shows me that the interest that's being taken currently far exceeds any given State's boundaries with regard to what's taking place. So the States themselves are not acting in an isolationistic fashion. In drafting their new laws they are looking across the country. I was a member of the Governor's commission to revise the mental health code for the State of Illinois for 4 years. I am currently consulting with numerous States. I think I'm on three Governors' commissions working to revise insanity cases. I think the States on their own initiatives are going beyond the confines and boundaries making sure they make revisions that they don't eliminate anything, that they are informed and not just trying to meet their own needs in their given State.

Mr. KASTENMEIER. On that point, I think both the gentleman from North Carolina and I would agree with you that what you and many others are doing in this field has been very constructive indeed, and a great deal of progress has been made through the years and certainly in terms of that we would like to congratulate you and those you represent.

In any event I want to commend you for your presentation. It's been very useful and you have made some important suggestions to us.

Mr. GRISCHKE. I want to thank you very much for the opportunity to be here.

Mr. KASTENMEIER. I would like to call as our last witness this morn- Ms. Laura LeWinn, who we are pleased to have here testifying in place of the Honorable Stanley Van Ness, the Public Advocate of New Jersey. We are quite sorry that Mr. Van Ness cannot be here this morning. We understand he's ill and we wish him a speedy recovery.

Last Congress Mr. Van Ness testified at our hearing and was a very valuable witness. His office, that of Public Advocate, was created in 1974, a State cabinet level agency in the State government, the main

function of which is to protect institutionalized persons and otherwise assist citizens and the public in these matters, and indeed I'm sure that our full committee chairman, Mr. Rodino, would like to have heard Mr. Van Ness and would have liked to welcome him this morning. We are pleased to have you here, Ms. LeWinn. You may proceed as you wish. I know you have a rather extensive testimonial document, a 21-page document, by Mr. Van Ness, which you may desire to read in full, or summarize, or whatever you wish.

TESTIMONY OF LAURA LEWINN, DEPUTY DIRECTOR, DIVISION OF MENTAL HEALTH ADVOCACY, OFFICE OF PUBLIC ADVOCATE, STATE OF NEW JERSEY

Ms. LEWINN. I think you will be relieved to hear that I do not intend to deliver it in full to the committee, Mr. Chairman, but I would like to submit a brief oral summary that will highlight and pinpoint some of the views expressed in the written statement.

Mr. KASTENMEIER. Fine. We will accept Mr. Van Ness' full statement for the record, without objection.

[Complete statement follows:]

STATEMENT OF STANLEY C. VAN NESS ON H.R. 10

Mr. Chairman and members of the committee: Thank you for giving me the opportunity to testify in support of H.R. 10. This legislation would authorize the Attorney General to institute civil actions when the Federal constitutional and statutory rights of individuals who are incarcerated or institutionalized in State-run facilities are violated. I strongly support pasage of this bill as a means by which those confined persons least able to represent themselves might seek meaningful redress of their grievances, and as a measure to ameliorate the misery now faced by such citizens. For it is those persons who are the focus of the protections of H.R. 10—the mentally ill, the developmentally disabled, the young, the aged, and the imprisoned—who are traditionally the poor, the minorities, the voiceless, and those isolated from the mainstream of the majoritarian, democratic political system. The daily conditions facing such institutionalized populations mandate the quick passage of this legislation.

At the outset, I would like to clarify to the members of the committee that my testimony is not presented as the position of the State of New Jersey. It does, however, reflect the position of my department which, by statute, has the responsibility and authority to act on its own motion to address many of the concerns that would be faced by the Attorney General under H.R. 10.

Within the Department of the Public Advocate, there are five separate units which have authority to act on behalf of the mentally ill, the mentally retarded, the aged, juveniles, the handicapped and the imprisoned. As a result, we are uniquely familiar with responsible representation of institutionalized persons through negotiations and, when necessary, through litigation.

In our work in this field in New Jersey, we have uncovered numerous examples of deprivations of constitutional magnitude in State-run and supported institutions, despite the fact that most such facilities are operated by dedicated and conscientious administrators. We have no doubt, and other testimony before this committee confirms, that such conditions can be found throughout the country. It is most assuredly the right and the duty of the Government of the United States to see to it that the constitutional rights of its citizens are protected. This bill merely creates a mechanism by which that can be achieved.

I would recite a litany of horror stories of the conditions which have been found to exist in institutions as evidence that this legislation is needed: Already others have made out that case forcefully. Instead, as perhaps the only State government officer who will testify in support of H.R. 10, I think that it would be useful to answer some of the concerns expressed by those who have opposed it, since our experience may offer a unique perspective on that score.

First, however, it might be helpful if I were to give an overview of some of those components within the Department of the Public Advocate which provide services to some of the discrete populations in question. The Division of Mental Health Advocacy, for instance, provides legal representation and advocacy services for any indigent mental hospital admittee, in any proceedings concerning that individual's admission to, retention in, or release from confinement. In addition to three field offices—which provide representation to individuals who either face involuntary civil commitment to a psychiatric facility, or receive periodic judicial reviews of their confinement status and continued need for institutionalization, or seek release from confinement through habeas corpus petitions—the Division of Mental Health Advocacy also has a class action office which represents the interests of indigent mental hospital admittees in such disputes and litigation as will best project the interests of such mental hospital admittees as a class on issue of general application to them.

In its nearly five years of existence, the Division of Mental Health Advocacy has uncovered numerons instances of neglect or mistreatment of the mentally ill in our State institutions. The nature and frequency of these instances often point clearly to an institutional pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, inhumane and anti-therapeutic living conditions. Consequently, the class action office within the Division of Mental Health Advocacy has instituted litigation, on behalf of institutionalized patients, against some of the State hospitals. These lawsuits have been grounded on principles of Federal constitutional law, originally established in such landmark cases as *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 172), 344 F. Supp. 387 (M.D. Ala. 1972), aff'd *sub. Nom. Wyatt* v. *Aderholt*, 503, F.2r 1305 (5 Cir. 1974), to be discussed below.

For example, we have litigated a class action suit on behalf of all patients confined in one of our State hospitals, in which we alleged that hospital conditions of treatment and confinement violated constitutional guarantees of due process, freedom from cruel and unusual punishment, privacy and dignity. As a result, a consent decree was entered whereby the hospital authorities bound themselves to implement standards of care and treatment which comport with constitutionally mandated minima. The institutional conditions which gave rise to the suit initially, included lack of basic sanitation, lack of physical exercise, lack of privacy, inadequate diet, assaults on patients by attendants and by other patients, lack of adequate psychiatric, medical, and dental care, and the indiscriminate use of seclusion and restraints. *Doe* v. *Klein*, Docket No. L–12088–74 P.W. (N.J. Sup. Ct. Law Div., Morris Cty. 1974), reported at 1 *Mental Disability Law Reporter* 474 (May–June 1977).

In other litigation, the Division of Mental Health Advocacy successfully challenged—on Federal constitutional grounds—the widespread institutional practice of forcibly administering psychotropic medications to patients in non-emergent circumstances; in a sweeping decision, the U.S. Federal District Court ruled that the patient's rights to privacy and the least restrictive alternative doctrine are implicated in such situations. The court further ordered specific procedures to comply with due process standards (including appointment of counsel and an independent expert witness) to be followed when the patient elects to protest the administration on medication. *Rennie* v. *Klein*, —F. Supp.— (D.N.J. 1978).

Federal constitutional rights have been directly implicated in other litigation brought by the Division of Mental Health Advocacy. A recently-obtained State supreme court decision establishes that persons charged with criminal offenses and subsequently commited to psychiatric facilities following a finding of "not guilty by reason of insanity" are entitled, on due process grounds, to periodic judicial review of their confinement in the same manner as civilly committed patients. *State* v. *Fields*, 77 N.J. 282 (1978). This decision greatly expands the rights of access to court and counsel for a significant segment of the institutionalized population in New Jersey. Further illustration of the division's role in vindicating Federal rights of the institutionalized is found in the case of *Carroll* v. *Cobb*, 139 N.J. Super. 439 (App. Div. 1976), in which the division successfully argued that persons could not be barred from registering to vote because of their residence at a State school for the retarded. The court's decision on this issue was the first of its kind nation-wide.

The division of mental health advocacy is currently involved in other major litigation in which patients' rights arise in a constitutional context. In

Schindenwolf v. *Klein*, Docket No. L-41293-75 P.W. (N.J. Sup. Ct. Law Div., Mercer Cty. 1976), reported at 10 *Clearinghouse Rev.* 393, (1976); 11 *Clearinghouse Rev.* 505 (1977), a plaintiff class of institutionalized patients statewide are asserting a constitutional right to treatment which includes the right to work on a voluntary, and adequately compensated basis. In *Cospito* v. *Califano*, Docket No. 77-0869, 0870 (D.N.J. 1977), division attorneys are seeking the restoration of supplemental security income benefits to institutionalized patients at a State hospital; these patients lost their eligibility for such benefits when the hospital lost its accreditation from the Joint Commission on the Accreditation of Hospitals.

The present time is particularly ripe for bestowing upon the office of the Attorney General broad affirmative powers such as those codified by H.R. 10. In recent years, the Federal courts have demonstrated an increasing willingness to entertain—and favorably adjudicate—claims on behalf of institutionalized mental patients relating to conditions of their care, treatment and maintenance. U.S. District Judge Frank M. Johnson, Jr.'s seminal decision in *Wyatt* v. *Stickney*, above, established the constitutional right of patients to receive such treatment as would afford a reasonable opportunity to cure or improve their mental conditions; to fulfill this constitutional right to treatment, the court held there must be a humane physical and psychological environment, qualified staff in sufficient numbers, and individualized treatment plans for each patient. Further, in *New York State Association for Retarded Children, Inc.* (*N.Y.S.A.R.C.*) v. *Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), supplemented *sub nom.* *N.Y.S.A.R.C.* v. *Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), relief was granted to institutionalized retarded persons on the basis of a constitutional right to protect from harm grounded in part upon the eighth amendment ban against cruel and unusual punishment.

In addition to these cases, Federal courts have ordered relief in other situations demonstrating substandard institutional conditions. For example, in a case involving institutionalized juveniles, the court held that "practices and policies in the field of medicine, among other professional fields, are within judicial competence when measured against requirements of the constitution," *Nelson* v. *Heyne*, 491 F. 2d 352, 357 (7 Cir. 1974); citing the Eighth and Fourteenth Amendments, the court enjoined the institutional practices of corporal punishment and punitive use of drugs against the juvenile inmates of a State reform school. A similar result was reached on behalf of juveniles committed to the custody of State authorities in Texas, in *Morales* v. *Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), reversed 535 F.2d 864 (5 Cir. 1976) reinstated 430 U.S. 322 (1977). As I noted at the outset, our department has an office of child advocacy specifically established to represent juveniles in New Jersey facilities in matters involving the conditions of their confinement.[1]

In *Welsch* v. *Likins*, 373 F. Supp. 487, (D. Minn. 1974), a Federal court clearly held:

"It is the Court's duty under the Constitution to assure that every resident of [defendant hospital] receives at least minimally adequate care and treatment consonant with the full and true meaning of due process clause."

In the wake of cases such as *Welsch* and *Wyatt*, the United States Supreme Court held, for the first time in 1975, in a mental health setting, that involuntary custodial confinement without treatment of a mental patient not dangerous to himself or others violated that patient's constitutional right to liberty, *O'Connor* v. *Donaldson*, 422 U.S. 563, 575-576 (1975), characterizing the argument that the Court should not be involved as "unpersuasive," adding:

"Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present."

Id. at 574. n. 10.

This brief overview reflects the creative responsiveness of the Federal Judiciary when faced with challenged to unconstitutional and unconscionable standards of acre for the institutionalized mentally ill and disabled. In the words of Judge Johnson:

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[1] In addition, it should be noted that this Department's Division of Public Interest Advocacy has litigated cases on behalf of elderly residents of nursing homes, arguing successfully that they are entitled to procedural due process prior to their involuntary transfer to other facilities. *Klein* v. *Califano*, —F.2d— (3 Cir. 1978).

"Ours is a government of separate and equal powers. Under our Constitution, the duty of protecting the health and well-being of our citizenry falls, in the first instance, on our duly elected representatives in the executive and legislative branches of government. To the executive and legislative branches is also entrusted, in the first instance, the responsibility for protecting and securing these inalienable rights to liberty and dignity which we as a free people, enjoy. However, when the representative arms of our government, either affirmatively through the arrogation of undelegated powers or passively through the callousness and neglect, fail to perform their role in securing these rights and leave them endangered, it is the constitutional duty of the judiciary to step in and fill this dangerous void." [2]

These sentiments were recently echoed by the *President's Commission on Mental Health: Task Force on Legal and Ethical Issues* which, in issuing its final report and recommendations, advocated the endorsement of "legislation which would give the United States Department of Justice standing to litigate on behalf of mentally handicapped persons whose civil and/or constitutional rights have been violated." 4 APP., TASK FORCE REPORT SUBMITTED TO THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 1359, 1391 (1978). I can do little more than add my voice to that of the task force's.

I should say that I recognize the often-expressed fear that, if this legislation is to be enacted, all of the States would be invaded by armies of Justice Department lawyers who will file suits willy-nilly over every little problem found in a hospital or institution. This projection is far removed from reality. The safeguards built into the law insure that only pervasive and egregious conditions will be dealt with at all, and make it impossible for the attorney general to go to court until all non-litigative means of resolving the problem have been exhausted. Moreover, as the experience of the Department of the Public Advocate makes clear, having the power and authority to bring suit does not mean that it will be exercised for, with proper attitudes on all sides, much can be accomplished without going to court. On the other hand, it must be recognized that without that authority in reserve, it will be at times difficult to bring about a reform through negotiation.

The experience of our Office of Inmate Advocacy may be instructive on this point. About three years ago, that office, which has statutory authority to represent the interests of persons in penal confinement, began a special program dealing with county jails. New Jersey has twenty-one counties which contain twenty-nine adult jails and prisons. To begin this project, staff of the office visited all of those institutions and comprehensively evaluated them with regard to conditions faced by the inmates. It was determined that major deficiencies with regard to legal and professional standards existed in eleven institutions in ten counties. In nine of these, a report on our findings was prepared and discussions were held with county officials. In all cases, some degree of cooperation was achieved, and the principal problems corrected. In only one, the local sheriff decided to "stonewall," refusing to let our staff into the jail, and later refusing to agree to any but a few minor reforms. Because of this posture, the Office was compelled to bring suit. In time, under the reasonable leadership of the county's legal staff and governing body, a settlement was reached on most of the issues. Thus, in three years of operation, in twenty-one counties, it has been necessary to resort to litigation only once. On the other hand, it is clear that if the power to bring suit did not exist, the substantial improvements that were made elsewhere might not have been as readily achieved.

I have little doubt that this pattern will be typical of what will occur nationally when H.R. 10 becomes law, particularly under the conscientious direction of Attorney General Bell and Civil Rights Division Head, Drew Days.

Some of the other arguments advanced by the opponents of this bill remind me of the classic law school story of the defenses raised by the man sued for breaking his neighbor's wagon. First, he said he never had the wagon. Second, he claimed that it was already broken when he borrowed it. Finally, he swore that it was perfectly alright when he returned it. Similarly, the State officials challenging this bill say that existing law is adequate to deal with the problems now found in our institutions, but that it would pose an intolerable financial

[2] Speech by Judge Frank M. Johnson, Jr., at the Dedication of the G. Werber Bryon Psychiatric Hospital, Columbia, S.C., Feb. 21, 1978.

burden on the States to comply with the court orders that will be extended against them. While lawyers may freely and appropriately raise inconsistent defenses in court, they should be challenged if they do so in Congress. If existing laws were working as well as they say, the institutions would be functioning in accordance with legal standards right now, and there would be little cost involved in improving them. That some costs will be incurred in some places is clear evidence that substandard facilities do exist. and that existing laws and remedies have not met this need.

A further comment on the financial burden argument is in order here. As a State official, I am well aware of the many demands on the State and local taxpayers, and the justifiable endeavor to limit expenditures. However, as long as our States and counties continue to operate mental hospitals, senior citizen housing, juvenile detention facilities, and jails, I cannot agree that our fellow citizens who are confined in them must he subjected to abuse because we cannot "afford" to treat them with humanity. The deprivation by a State of fundamental constitutional rights can never be justified hy a claim of inadequate fiscal resources. A State is not free. for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individual constitutional rights. The choice between administrative convenience and economy on the one hand, and Federal privilege and immunities on the other hand, has already been made by those who drafted our Federal constitution and the States that agreed to abide by its dictates.

That brings up the argument of the opponents that this bill is in itself unconstitutional. Many members of this committee and others who will testify before you are well versed in constitutional law: As an attorney with considerable experience in that field myself, I have no doubt of the constitutional validity of H.R. 10. It creates no new rights, but merely provides a mechanism for the enforcement of the existing rights of United States citizens. As such, it is clearly proper under section 5 of the fourteenth amendment.

I would like, however, to make some comments on section 4 of H.R. 10, which relates to grievance procedures in penal facilities, as that section was inserted since I last reviewed this matter with you. It has been suggested that some prisoners' rights advocates, otherwise supportive of the bill, oppose this section. I do not agree, as I consider it a very valuable step. In fact I would suggest expanding the scope of applicability of the proposed grievance resolution system to include juveniles held awaiting trial. New Jersey has recently promulgated administrative regulations establishing grievance procedures in our State juvenile detention facilities; these procedures are similar in nature and scope to those proposed in section 4 of H.R. 10 for adults confined in jails, prisons, other correctional facilities, and pretrial detention facilities. We perceive no sound basis, in logic or fact, for differential treatment of adult and juvenile residents of pretrial detention facilities for these purposes.

In our work in prisons and jails, we have found that the most important ingredient to insure that both the legitimate concerns of the inmates and the safe and secure function of the institution are afforded is an effective communication mechanism between the population and the administration. The worst thing that one can do to a prisoner with a problem or a question is to give him no answer at all. Normally, it is better to deny the request quickly and clearly than to let the matter hand open. Thus, we frequently encourage jail administrators to set up grievance mechanisms for inmate complaints. In many cases wardens who have reluctantly complied with that request have come to us after a few months to say, "I don't know how we got along without it before now. It makes my job much easier."

Section 4 will encourage the development of effective grievance procedures in two ways. First, it will provide a model grievance mechanism which can be readily adapted for any prison or jail. Second, it will reduce the likelihood that administrators who adopt such mechanisms will be compeled to answer *pro se* suits in Federal courts. (As an important side benefit, it will reduce the time that Federal judges must spend on such matters.) On the other hand, there is no mandatory requirement that grievance procedures be set up, and no administrator will be forced to adopt one. I am convinced that most of them will welcome the idea, and the provisions of this section will make it easier for them to do so, and give them a small reward for the action. The "price" of continuing 42 U.S.C.A. § 1983 for no more than 90 days, it seems to me, is a relatively small one for the expected benefits.

Another area of public advocate experience, equally illustrative of the need for passage of H.R. 10, is the provision of protection and advocacy services for the mentally retarded and other developmentally disabled individuals pursuant to P.L. 94–103, known as the Developmental Disabilities Bill of Rights Act. P.L. 94–103, enacted into law in 1975, mandates that each State and territory establish a system to protect and advocate the rights of mentally retarded and other developmentally disabled people. This aspect of 94–103 has been successfully implemented and today such systems, commonly called P&A systems, operate in 53 States and Territories.

Critics of H.R. 10 argue that in light of this success, such legislation is unnecessary because the P&A systems are empowered to pursue "legal, administrative and other remedies" on behalf of developmentally disabled people and can thus protect them from the abuse and neglect inherent when care is provided in institutional settings. As chief administrator of an agency which is credited with implementing the first P&A system in the country—a system which has served as a model for those established in many other jurisdictions—I feel particularly qualified to refute the theories of such critics and to say that, if anything, the experience of P&A systems generally, and our own program in particular, demonstrates that the enactment of H.R. 10 is necessary.

One cannot say with certainty what the developmentally disabled population of New Jersey is. Estimates vary from between 100,000 to 300,000. Federal funding for protection and advocacy is made available on the basis of a formula grant derived from the total population of each State. New Jersey's share for the current fiscal year is $78,000. It has not been increased since the legislation was enacted; and President Carter's budget request for FY 1980 seeks the same level of funding, despite authorization by Congress to increase it more than fourfold. However, New Jersey is more fortunate than many of its sister States. More than 10 States receive the minimum allotment of $20,000 per year. These include many of the large, sparsely populated Western States which dwarf New Jersey geographically. It is not necessary to dwell on the strain which geographic obstacles can place on staff and resources. New Jersey has had the further good fortune of attaining three additional grants which have increased its operating budget to about $300,000 annually, and which enable us to maintain a professional staff of 10. Many other States have not been able to obtain additional resources to supplement their programs.

The P&A systems, New Jersey's included, are very small and their task is very large. To expect that such systems can fully address the problems of the institutionalized retarded presupposes a program on a scale which does not exist. It also presupposes that institutional issues are the only concerns of the developmentally disabled persons which a P&A system must address; this is not the case.

Following the mandate of P.L. 94–103 and the guidance of our advisory committee—the New Jersey developmental disabilities council—we are attempting to provide a full assortment of advocacy services. Recognizing that a significant number of potential clients do not have the capacity to voice a complaint, we have instituted an ongoing program of outreach to inform and educate service providers and the general public about the rights and needs of developmentally disabled persons. We are also working with parents' groups and other citizens groups to develop in them the capacity to be self-advocates, and thereby free us to serve others.

We also recognize the importance of providing technical assistance to affect the development of new laws and regulations to better meet the needs of the disabled. As consciousness about the rights of such individuals is raised, the opportunities to provide such services has increased. On the State level, we are actively involved with law and regulations involving such important issues as as guardianship, barrier-free design, special education, case management and civil rights.

Our department maintains a toll-free hot line and the P&A program has received and attempted to negotiate a sointion in more than 600 cases. The number of complaints we receive is escalating as we become better known. However, we have passed the point where resources are sufficient to address all of the complaints which we receive. Complaints involving special education and the adequacy of individualized habilitation plans must be toned down unless we can negotiate a solution without resort to the courts or the administrative appeals process. Otherwise, we would soon lose our capacity to handle new complaints.

Fortunately, in many cases, a settlement can be easily negotiated because service providers are usually conscientious and willing to modify their programs to meet the needs of their clientele. But some of these complaints prove intractable, and litigation becomes necessary. We have litigated cases involving issues such as guardianship, access to programs, treatment rights and deinstitutionalization. It should be understood that our program is in a better position to initiate a lawsuit than many P&A systems which are without the resources to retain an attorney and must rely upon an often tenuous relationship with a program such as legal services to accept referrals. Still other P&A systems have invested their resources more heavily in community training and other similar programs and may have only one staff attorney.

Many problems are more easily resolved when they are brought to public attention so that the weight of public opinion can be added to the force of legal argument. We have recently completed several studies which can be used to mobilize public opinion in support of the needs of developmentally disabled persons. Surveys of the Adequacy of community based programs for deinstitutionalized persons and of the implementation of the New Jersey developmental disabilities rights act by the state operated institutions have been recently completed. While the results of these surveys are disturbing, we will first attempt to bring public pressure to bear on the persons responsible for the situations uncovered before considering litigation.

The initiation of institutional suits by the Justice Department which would be permitted if H.R. 10 were enacted, would allow the P&A systems to play other roles in the improvement of institutional care more in keeping with their limited resources and broad mandate to serve all developmentally disabled people. For instance, if resources permitted, they might seek to be involved as *amicus curiae*, to advise the court of the impact a particular remedy might have in practice or its impact on persons not a member of the class or in other parts of the service delivery system not directly challenged in the proceedings. A role in monitoring the implementation of consent orders or other subsequent relief might be assumed. A number of roles are possible.

It is not possible for a system such as New Jersey's to address more than a fraction of the institutional problems which exist in this state. And to even do this involves a trade off of advocacy services to others. In my opinion the P&A systems throughout the nation have been effective despite inadequate funding. But even if more funding for them was realized, the problems remain large and complex and the potential assistance provided by H.R. 10 vital.

It might be argued that my recitation of the public advocate's activities may have proved too much—that these are state problems that can and should be handled by state agencies. However, it should be emphasized that New Jersey is *the only one* of fifty states that provides such comprehensive representation for the incarcerated and the institutionalized. Even in New Jersey, the necessity for involvement by the attorney general may arise. One example is the New Jersey State Prison System, which is presently operating at greater than 150% of capacity. The effects of this overcrowding on inmates may have risen to the level of cruel and unusual punishment. Significantly, this is one area in which the state legislature has refused to continue funding for the advocacy of prisoners' rights. Finally, even in the mental health field, because of staffing limitations it is impossible for our division to provide individual services to more than half of the institutionalized patients of the state, or to provide class action representation on many of the otherwise-meritorious cases which may come to our attention.

If every State were to adopt legislation creating agencies similar to the public advocate, the Federal Government's interest in the passage of H.R. 10 should still remain intact.[3] If the Federal law is violated anywhere in this country, whether it be by an income tax evader or by the warden of a State prison, the Federal Government has the power and the duty to uphold the legitimacy of its laws. No strawman argument of "federalism" can vitiate the supremacy clause of the Federal Constitution. As the Supreme Court stated nearly 90 years ago, "Without the [concept of] sovereignty * * *, the national Government would be nothing but an advisory government * * * it must execute its powers, or it is no government." *Cunningham* v. *Neagle*, 135 U.S. 64 (1890).

[3] There is little doubt that New Jersey is setting the pace for the nation in protecting the rights of the institutionalized. However, State efforts even in New Jersey are increasingly experiencing the pressures of budget belt-tightening.

These arguments are further bnttressed hy the clear language of the United States Supreme Court in cases such as *Bounds* v. *Smith*, 430 U.S. 817, 97 *s. ct.* 1491, 1494, 1495 (1977), holding that it is "Now estahlished beyond donbt that prisoners have a constitutional right of access to the courts," and that that access be "adequate, effective and meaningful." In the *Bounds* case, the Supreme Court takes note of the State's argument that such court involvement exceeds its powers, hut specifically rejects that theory as a "[particnlarly inappropriate] hyperbolic claim," id. at 1500, nothing that judicial restraint "cannot encompass any failure to take cognizance of valid constitntional claims." *Id.*, citing *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

As I stated in my previous appearances before this committee in hearings on the predecessors to H.R. 10, namely H.R. 2439 and 5791, the constitutional mandate for this legislation is huttressed hy its practical and moral necessity. While 42 U.S.C.A. § 1983 provides possihle remedies for individnals whose civil rights are ahridged hy State government officials, many prisoners and the mentally handicapped cannot utilize that avenue of redress. Pretrial detainees are often afraid to voice their opposition to jail staff and jail policies because they are afraid their actions will affect the outcome of pending criminal prosecutions. In addition, they are a transient population and may not be in jail when an action is ready to be filed. While class-action certificates alleviate some of these problems, the remedy snpplied by this bill appears more practicable. Fnrthermore, institutionalized persons, such as the mentally disabled, often may not have full cognizance of their rights or may themselves acquiesce in an illegal practice snch as racial segregation. Indeed, the vast majority of those involuntarily confined in State institutions are those without sufficient funds to represent themselves. Class representation hy the Attorney General may be the only means by which their grievances will he redressed.

It is unlikely that the Attorney General, in exercising his mandate under this hill would he resented for "outside interference" any more than is the pnblic advocate. It should he noted that the State agencies against which we have bronght civil actions are represented by the State Attorney General. As advocate for those who run the State institntions the State Attorney General has a times assumed a position distinctly adversarial to that of those institntionalized or incarcerated.

In order to effectively fnlfill the purpose of the hill, however, in addition to onr suggestions as to expansion of the grievance procedures in section 4. we have one further amendatory change to clarify the intent of this hill. In section 1(1)(A), the term "institntion" currently incindes any facility "which is owned, operated or managed hy or provides services on behalf of or pursuant to a contract with and State or political snbdivision of a State." This section should be clarified to specifically include residential facilities snch as nursing homes and boarding homes which may he operated pnrsuant to State *licensure* rather than through a contractual agreement. We snggest that the section in question be amended by inserting the words "or licensure by" after the word "with" on p. 3, line 2 of the hill.

Allow me to conclude with one final thought: When I last appeared before this committee on the prior version of H.R. 10. I recalled Dostoevski's comment that the spirit of a nation can he judged by the quality of its prisons. If we are unahle to make some effort to insure that the mentally ill, the aged, homeless and trouhled youth, the mentally and physically handicapped, as well as the imprisoned, who reside in our State-run institutions are treated with basic humanity and decency, what kind of spirit can we say that we have as a nation? The fate of H.R. 10 may provide an answer to this qnestion.

Ms. LEWINN. Thank you. I would at the outset, Mr. Chairman and Mr. Gudger, like to express the sincere regret of Commissioner Stanley Van Ness for his inability to be here today, as he was concerned to appear before you on this bill and to give you the benefit of the views of the public advocate of New Jersey with regard to the purposes and intent of H.R. 10.

The New Jersey Department of the Public Advocate, as you know, strongly supports passage of H.R. 10 as a means by which those confined people least able to represent themselves might seek meaningful redress of their grievances, and as a measure to ameliorate the misery

now faced by such citizens. For it is those persons who are the focus of the protections of H.R. 10—the mentally ill, the developmentally disabled, the young, the aged, and the imprisoned—who are traditionally the poor, the minorities, the voiceless, and those isolated from the mainstream of the majoritarian, democratic political system. The daily conditions facing such institutionalized populations mandate the quick passage of this legislation.

At the outset, I would like to clarify to the members of the committee that my testimony is not presented as the position of the State of New Jersey. It does, however, reflect the position of my department which, by statute, has the responsibility and authority to act on its own motion to address many of the concerns that would be faced by the Attorney General under H.R. 10.

Within the Department of the Public Advocate, there are five separate units which have authority to act on behalf of the mentally ill, the mentally retarded, the aged, juveniles, the handicapped, and the imprisoned. As a result, we are uniquely familiar with responsible representation of institutionalized persons through negotiations and, when necessary, through litigation.

Our written statement defines the jurisdictions of the five components and also spells out the numerous successes that have been achieved in establishing rights for these persons. We have uncovered in New Jersey numerous examples of deprivations of constitutional magnitude in State-run and State-supported institutions, despite the fact that most such facilities are operated by dedicated and conscientious administrators. We have no doubt, and other testimony before this committee confirms, that such conditions can be found throughout the Government of the United States to see to it that the constitutional rights of its citizens are protected. This bill creates a mechanism by which that can be achieved.

I could recite a litany of horror stories of the conditions which have been found to exist in institutions as evidence that this legislation is needed. Already others have made out that case forcefully. Instead, as perhaps the only State government officer who will testify in support of H.R. 10, I think it would probably be more useful to answer some of the concerns expressed by those who have opposed it, since our experience may offer a unique perspective on that score.

The present time is particularly ripe for bestowing upon the Office of the Attorney General broad affirmative powers such as those codified by H.R. 10. In recent years, the Federal courts have demonstrated an increasing willingness to entertain—and favorably adjudicate—claims on behalf of institutionalized mental patients relating to conditions of their care, treatment and maintenance.

As you pointed out. Mr. Chairman, the President's Commission on Mental Health Task Force on Legal and Ethical Issues has endorsed this kind of legislation.

I should say that I recognize the often expressed fear that, if this legislation is to be enacted, all of the States would be invaded by armies of Justice Department lawyers who will file suits willy-nilly over every little problem found in a hospital or institution. This projection is far removed from reality. The safeguards built into the law insure that only pervasive and egregious conditions will be dealt with

at all, and make it impossible for the Attorney General to go to court until all nonlitigative means of resolving the problem have been exhausted. Moreover, as the experience of the Department of the Public Advocate makes clear, having the power and authority to bring suit does not mean that it will be exercised for, with proper attitudes on all sides, much can be accomplished without going to court. On the other hand, it must be recognized that without that authority in reserve, it will be at times difficult to bring about a reform through negotiations.

The experience of our Office of Inmate Advocacy may be instructive on this point. About 3 years ago, that office, which has statutory authority to represent the interests of persons in penal confinement, began a special program dealing with county jails. New Jersey has 21 counties which contain 29 adult jails and prisons. To begin this project, staff of the office visited all of those institutions and comprehensively evaluated them with regard to conditions faced by the inmates. It was determined that major deficiencies with regard to legal and professional standards existed in 11 institutions in 10 counties. In nine of these, a report on our findings was prepared and discussions were held with county officials. In all cases, some degree of cooperation was achieved, and the principal problems corrected. In only one, the local sheriff decided to "stonewall," refusing to let our staff into the jail, and later refusing to agree to any but a few minor reforms. Because of this posture, the office was compelled to bring suit. In time, under the reasonable leadership of the county's legal staff and governing body, a settlement was reached on most of the issues. Thus, in 3 years of operations, in 21 counties, it has been necessary to resort to litigation only once. On the other hand, it is clear that if the power to bring suit did not exist, the substantial improvements that were made elsewhere might not have been as readily achieved.

I have little doubt that this pattern will be typical of what will occur nationally when H.R. 10 becomes law, particularly under the conscientious direction of Attorney General Bell and Civil Rights Division Chief Drew Days.

Some of the other arguments advanced by the opponents of this bill reminds me of the classic law school story of the defenses raised by the man sued for breaking his neighbor's wagon. First, he said he never had the wagon. Second, he claimed that it was already broken when he borrowed it. Finally, he swore that it was perfectly all right when he returned it. Similarly, the State officials challenging this bill say that existing law is adequate to deal with the problems now found in our institutions, but that it would pose an intolerable financial burden on the States to comply with the court orders that will be extended against them. While lawyers may freely and appropriately raise inconsistent defenses in court, they should be challenged if they do so in Congress. If existing laws were working as well as they say, the institutions would be functioning in accordance with legal standards right now, and there would be little cost involved in improving them. That some costs will be incurred in some places is clear evidence that substandard facilities do exist, and that existing laws and remedies have not met this need.

A further comment on the financial burden argument is in order here. As a State official, I am well aware of the many demands on the State and local taxpayers, and the justifiable endeavor to limit expenditures. However, as long as our States and counties continue to operate mental hospitals, senior citizen housing, juvenile detention facilities, and jails, I cannot agree that our fellow citizens who are confined in them must be subjected to abuse because we cannot "afford" to treat them with humanity. The deprivation by a State of fundamental constitutional rights can never be justified by a claim of inadequate fiscal resources. A State is not free, for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individual constitutional rights. The choice between administrative convenience and economy on the one hand, and Federal privilege and immunities on the other hand, has already been made by those who drafted our Federal Constitution and the States that agreed to abide by its dictates.

That brings up the argument of the opponents that this bill is in itself unconstitutional. Many members of this committee and others who will testify before you are well versed in constitutional law. As an attorney with considerable experience in that field, Commissioner Van Ness has no doubt of the constitutional validity of H.R. 10. It creates no new rights, but merely provides a mechanism for the enforcement of the existing rights of U.S. citizens.

I would like, however, to make some comments on section 4 of H.R. 10, which relates to grievance procedures in penal facilities, as that section was inserted since we last reviewed this matter with you. It has been suggested that some prisoners' rights advocates, otherwise supportive of the bill, oppose this section. We do not agree, as we consider it a very valuable step. In fact, we would suggest expanding the scope of applicability of the proposed grievance resolution system to include juvenile held awaiting trial. New Jersey has recently promulgated administrative regulations establishing grievance procedures in our State juvenile detention facilities; these procedures are similar in nature and scope to those proposed in section 4 of H.R. 10 for adults confined in jails, prisons, other correctional facilities, and pretrial detention facilities. We perceive no sound basis, in logic or fact, for differential treatment of adult and juvenile residents of pretrial detention facilities for these purposes.

In our work in prisons and jails, we have found that effective communication mechanism between the population and the administration is essential. The worst thing that one can do to a prisoner with a problem or a question is to give him no answer at all. Normally, it is better to deny the request quickly and clearly than to let the matter hang open. Thus, we frequently encourage jail administrators to set up grievance mechanisms for inmate complaints. In many cases wardens who have reluctantly complied with that request have come to us after a few months to say, "I don't know how we got along without it before now. It makes my job much easier."

Section 4 will encourage the development of effective grievance procedures.

Critics of H.R. 10 also argue that protection and advocacy services provided under the 1975 Developmental Disabilities Act protect the disabled from abuse and neglect in institutional settings. As chief

administrator of a department which created the first such system in the country, I feel particularly qualified to refute the theories of such critics and to say that, if anything, the experience of P. & A. systems generally, and our own program in particular, demonstrates that the enactment of H.R. 10 is necessary.

The initiation of institutional suits by the Justice Department which would be permitted if H.R. 10 were enacted would allow the P. & A. systems to play other roles in the improvement of institutional care more in keeping with their limited resources and broad mandate to serve all developmentally disabled people.

It is not possible for a system such as New Jersey's to address more than a fraction of the institutional problems which exist in the State. And to even do this involves a trade off of advocacy services to others. In my opinion the P. & A. systems throughout the Nation have been effective despite inadequate funding. But even if more funding for them was realized, the problems remain large and complex and the potential assistance provided by H.R. 10 vital.

It might be argued that my presentation of public advocate's activities may have proved too much—that these are State problems that can and should be handled by State agencies. However, it should be emphasized that New Jersey is the only 1 of 50 States that provides such comprehensive representation for the incarcerated and the institutionalized. Even in New Jersey, the necessity for involvement by the Attorney General may arise. One example is the New Jersey State Prison System, which is presently operating at greater than 150 percent of capacity. The effects of this overcrowding on inmates may have risen to the level of cruel and unusual punishment. Significantly, this is one area in which the State legislature has refused to continue funding for the advocacy of prisoners' rights. Finally, even in the mental health field, because of staffing limitations it is impossible for our division to provide individual services to more than half of the institutionalized patients of the State, or to provide class action representation on many of the otherwise meritorious cases which may come to our attention.

As was stated in previous appearances before this committee in hearings on the predecessors to H.R. 10, the constitutional mandate for this legislation is buttressed by its practical and moral necessity. While 42 U.S.C.A. S. 1983 provides possible remedies for individuals whose civil rights are abridged by State government officials, many prisoners and the mentally handicapped cannot utilize that avenue of redress. Pretrial detainees are often afraid to voice their opposition to jail staff and jail policies because they are afraid that their actions will affect the outcome of pending criminl prosecutions. In addition, they are a transient population and may not be in jail when an action is ready to be filed. While class action certifications alleviate some of these problems, the remedy supplied by this bill appears more practicable. Furthermore, institutionalized persons, such as the mentally disabled, often may not have full cognizance of their rights or may themselves acquiesce in an illegal practice such as racial segregation. Indeed, the vast majority of those involuntarily confied in State institutions are those without sufficient funds to represent themselves. Class representation by the Attorney General may be the only means by which their grievances will be redressed.

It is unlikely that the Attorney General, in exercising his mandate under this bill would be resented for "outside interference" any more than is the Public Advocate. It should be noted that the State agencies against which we have brought civil actions are represented by the State attorney general. As advocate for those who run the State institutions, the State attorney general has at times assumed a position distinctly adversarial to that of those institutionalized or incarcerated.

In order to effectively fulfill the purpose of the bill, however, in addition to our suggestions as to expansion of the grievance procedures in section 4, we have one further amendatory change to clarify the intent of this bill. In section 1(1)(A), the term "institution" currently includes any facility "which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with any State or political subdivision of a State." This section should be clarified to specifically include residential facilities such as nursing homes and boarding homes which may be operated pursuant to State licensure rather than through a contractural agreement. We suggest that the section in question be amended by inserting the words "or licensure by" after the word "with" on page 3, line 2 of the bill.

Allow me to conclude with one final thought. It has been said that the spirit of a nation can be judged by the quality of its prisons. If we are unable to make some effort to insure that the mentally ill, the aged, homeless, and troubled youth, the mentally and physically handicapped, as well as the imprisoned, who reside in our State-run institutions are treated with basic humanity and decency, what kind of spirit can we say that we have as a Nation? The fate of H.R. 10 may provide an answer to this question.

Thank you for this opportunity to present this statement before the committee.

Mr. KASTENMEIER. Well, I thank you and Mr. Van Ness for the statement you have given this morning.

Ms. LeWinn, you are deputy director of the Division of Mental Health Advocacy of the Office of the Public Advocate of the State of New Jersey. Do you know of any other States that have an agency similar to this Office of Public Advocate in New Jersey?

Ms. LEWINN. There is no other State that currently has any comparable agency on a State level that provides the kinds and the scope of advocacy services encompassed by the various divisions of the Department of the Public Advocate.

Mr. KASTENMEIER. Something you suggested in the statement leads me to wonder whether you believe that the powers that you have in your agency and which the Attorney General will be granted under this bill would actually reduce litigation and encourage settlements as a result.

Ms. LEWINN. That has been our experience in a great percentage of the matters in which we have become involved. As I stated in my summary, we find that having the power to engage in litigation as a last resort or as an ultimate recourse often provides the necessary suasion and necessary influence in relating to or dealing with the service providers and the other State agencies who are responsible for the care or the maintenance of our clients, that that often gives the final impetus to the resolution of an issue without resorting to litigation. It enhances both the credibility of the division and the authority with which we speak.

Mr. KASTENMEIER. My last question goes to juveniles. Does New Jersey's grievance procedures for juveniles require that these procedures be exhausted prior to court action?

Ms. LEWINN. There is no parallel provision in the New Jersey law. These are State administrative regulations that have been promulgated by the Division of Youth and Family Services and the administrative regulations are silent as to the need for exhaustion.

Mr. KASTENMEIER. You know H.R. 10 does not discourage the development of grievance procedures for juveniles. It merely does not require exhaustion of such procedures by juveniles. Thank you.

I yield to the gentleman from North Carolina.

Mr. GUDGER. I want to commend you on your very excellent testimony and your very excellent abbreviation of this very lengthy brief, and I'm particularly gratified that it does review so many of the key cases and points out the development and the range of development of recognized rights of those who are institutionalized in their various phases and frames of reference.

I want to express the same interest that the chairman did in the fact that you have this department of public advocate. Many States have an office of child advocacy or other more restricted circumstances of advocacy, but I'm very impressed to see that you have all five units of the function in this department and I certainly am going to report on this to the attorney general of my own State. Thank you very much.

Ms. LEWINN. Thank you, sir.

Mr. KASTENMEIER. I'd like to yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you.

I noted in your statement that one of the major reasons that you gave for support of the legislation was the potential assistance that might be given by the Federal Government to the States.

You know there's no money in this legislation to assist the States in their programs for running the mental hospitals or the prisons, so I suppose that's just a hope that there might be money in the future. Is that right?

Ms. LEWINN. No; we don't see this bill as opening up avenues of providing Federal revenues for running the State institutions. We see the merit of the bill in providing the resources and prestige of the Justice Department in pursuing nonlitigative and litigative methods of prevailing upon State officials to bring conditions in their respective State institutions up to constitutional standards.

Mr. MOORHEAD. Could you give us some specific examples of conditions in New Jersey that you think warrant Federal interference?

Ms. LEWINN. Certainly, there are cases that are examples in the written statement that we have submitted to the committee, but I think that very briefly I can refer, as I said in my oral statement, for example, to the State prison system which is now operating at 150 percent of capacity, and this has led to conditions of incredible overcrowding, four to six men in a cell with no private toilet, totally unsanitary conditions, physical abuse, risk of assaultive behavior as much sparked by the frustration of the environmental conditions as by the individuals involved, the arbitrary and excessive use of punitive measures such as solitary confinement or restraint, both in the prisons and the mental institutions.

I think one good example in the mental institutions is recited in the case we describe in our written testimony which was the first major lawsuit that our division brought, and which was against one of the State hospitals in New Jersey on a class action basis alleging systematic deprivation of a full panoply of constitutional rights by virtue of the lack of treatment, the lack of sanitary environmental conditions, the lack of qualified staff, the substantial harm that was being done to patients both physically and psychologically by the continued daily confinement in such institutions. Certainly these are conditions that arise to the level of constitutional deprivations.

Mr. MOORHEAD. What has the State attempted to do about these conditions?

Ms. LEWINN. In the cases where we have gone into litigation, for example, in the case I just described to you involving the State hospital, the result of that litigation was a negotiated settlement, and there's been an extensive and very detailed consent judgment that has been entered in which the State has bound itself to provide services and maintenance according to certain standards, essentially standards that comport with those promulgated by Judge Johnson in *Wyatt* v. *Stickney*, the seminal case in this area; and the State has now bound itself under threat of contempt of court to provide this level of services.

Mr. MOORHEAD. I'm sorry I wasn't here when you were introduced. Are you a State employee or do you work for a private agency?

Ms. LEWINN. I'm employed by the State of New Jersey. I am the Deputy Director of the Division of Mental Health Advocacy which is one of the five major components of the Department of Public Advocate.

Mr. MOORHEAD. Do you suppose, short of going to court, there are ways that you in your capacity can meet with other State officials and try to work out some of these problems without having the State fighting the State in court procedures?

Ms. LEWINN. We do that constantly. We do regard litigation as the last resort, even though our statutory mandate establishes our division very definitely as a law office; not all the divisions within the public advocate are primarily legal offices, but our division is. We are staffed in equal numbers by attorneys and non-attorneys who are field representatives who are mental health professionals. We have on our own staff psychologists, psychiatric social workers, a psychiatric nurse, for example, and they provide an invaluable wealth of expertise and input that give us the wherewithal to sit down and negotiate so that we don't have to resort to litigation to get discovery, to get access to standards. We have a lot of that ammuntion or that wherewithal within our own staff.

So because of our own particular staffing pattern we are able to regard litigation as the last resort and we in fact do do a great deal of pre-litigation. I think as Mr. Davs referred to it in his testimony—pre-suit negotiations, that kind of activity.

Mr. MOORHEAD. When we talk about overcrowding in jails, you have the choice of either letting people go that have been sentenced to prison or else building new prisons. Has the State of New Jersey adopted the wrong priority in the expenditure of their moneys?

Ms. LEWINN. This is a real state of flux in New Jersey right now. A bond issue for constructing a new prison was just defeated in the last election. The parole board on the other hand has come under increasing criticism for what is being perceived by the public as a too liberal parole policy, as a result of pressure to depopulate the State prison system.

Mr. MOORHEAD. What do you think the solution to the problem would be?

Ms. LEWINN. As far as the prisons are concerned specifically?

Mr. MOORHEAD. Yes.

Ms. LEWINN. Certainly I can't avoid saying money is a major factor in any solution to a problem such as that. I think that litigation has proved effective to the extent that it's described in the written statement that I submitted where one of the initial class action litigations brought by our Division of Inmate Advocacy was against these kind of condition; and there again the State bound itself to ameliorate those conditions. I think certainly public acceptance of the need to spend dollars for this particular priority has a long way to go before that is established, but I also see litigation as an effective tool besides simply resorting to the public opinion sphere, in that, as I think Mr. Chairman, you mentioned in the prior witness' testimony, one of the advantages of the litigation is that even the defendants, the State agencies themselves, see sometime that they will be bound by a court order which in turn gives them the ammunition to go to the State legislature, and puts them in a strong position to assert their need for additional financing before the State legislature.

We have seen this happen not so much in New Jersey, unfortunately, but in other States where judgments have been entered against service providers, the State agency defendants, who have then gone to the legislature and have prevailed upon the fiscal authorities in their State because of the constitutionally couched mandate from the courts.

Mr. MOORHEAD. Is the lack of money the big problem or are there other problems that can be resolved without the money?

Ms. LEWINN. That question takes a couple of different answers, depending on which population you're talking about.

Mr. MOORHEAD. I'm talking about New Jersey.

Ms. LEWINN. Whether you're talking about the prisons or whether you're talking about the mental hospitals.

Mr. MOORHEAD. First, the prisons.

Ms. LEWINN. Lack of money is certainly a substantial factor. The political decision was to pursue a bond issue and the defeat of the bond issue was a very political statement, both as to the political tactic of choice and as to the response of the public to the needs as they saw it. The facts in New Jersey are that the current existing physical plant, the physical facilities in the prisons, are inadequate to house the populations that exist. It's not just that more people are getting sentenced to longer terms, but it's a reflection of the increase in population generally.

Mr. MOORHEAD. What is the situation with the mental health patients? One question that always comes up—are people being incarcerated as mental patients that could be just as well treated as outpatients, some of which may be even held against their will, that could take care of themselves under outpatient circumstances?

Ms. LeWinn. We certainly feel that that is the case in New Jersey and in fact this brings up a point that the former witness raised in terms of the movement toward deinstitutionalization. His statement was that litigation has caused this turnover or has been the impetus for this change in policy. Maybe to a certain extent it has in a number of States, but in New Jersey the service providing agency itself has administratively adopted a policy of deinstitutionalization, of reducing the populations in the large institutions and getting people into less restrictive, smaller, community settings. This has resulted in massive discharges from the hospital of patients to community facilities that don't exist, without sufficient community facilities having the time to develop. So what we're finding is, for example, a very high readmission rate, the revolving door syndrome is turning faster than ever.

So to a large extent, it is a question of money, but it's also a question in the mental health sphere of public attitudes and public acceptance and the destigmatization of the mental health or mental illness label, I should say. That has a lot to do with public acceptance.

Mr. Moorhead. Do you think the State of New Jersey could do a better job with the money they had available in both the penal institutions and the mental health institutions?

Ms. LeWinn. We certainly feel that there's room for improvement. The statistics in New Jersey show that it is much more economical—just cheaper—to maintain someone in a community setting, in a sheltered boarding home or licensed intermediate care facility. The per diem per capita cost is substantially lower than the per capita per diem cost to maintain that same person in an institution.

Mr. Moorhead. Which basically are you advocating: That the Federal Government compel the States to spend more money or the Federal Government provide more money for the assistance of the State or that the States be required to do a better job with the money they have, or a combination of that? I'm trying to get at your real goal.

Ms. LeWinn. In connection with our testimony on the last bill, we are supporting the specific purpose of this bill which is to give a clear codified recognition to the right of the Justice Department to intervene in litigative and prelitigative matters or routes in compelling compliance, as defined by constitutional standards, with the rights of the institutionalized; the courts are becoming increasingly the protectors of the rights of the institutionalized, and the Justice Department has a right, a responsibility and a duty, to be involved in these cases under the conditions and the prerequisites as set forth in this legislation.

Mr. Moorhead. Thank you very much.

Ms. LeWinn. Thank you.

Mr. Gudger. Ms. LeWinn, we want to thank you again for your excellent testimony. When I earlier made an observation of the fact that I would be communicating this Department of Public Advocate to the attorney general of my State, it's for the reason that North Carolina is now sitting in its general assembly. He's the draftsman and the briefer for the Governor and I'm sure that there are many concepts in your plan that would be at least worthy of consideration by North Carolina.

I commend you for your very excellent testimony and your very clear and concise answers to such a long and very, very challenging series of questions. We found your information both enlightening in the area of your own specialty and in the broad scope of the testimony of Stanley C. Van Ness, which testimony as I say I find exceedingly exciting. Thank you very much for being here.

Mr. LEWINN. Thank you very much.

Mr. GUDGER. We stand adjourned.

[Whereupon, at 11:10 a.m., the hearing was adjourned.]

APPENDIXES

Appendix 1—Leoislative Materials Related to H.R. 10

a. H.R. 10, as introduced, January 15, 1979.
b. H.R. 10, as reported by the Committee on the Judiciary, April 3, 1979.
c. House Report 96–80 to accompany H.R. 10, April 3, 1979.
d. H.R. 10, as approved by the House of Representatives, May 23, 1979.
e. Proceedings of the House of Representatives relating to H.R. 10, May 23, 1979.

96TH CONGRESS
1ST SESSION

H. R. 10

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 15, 1979

Mr. KASTENMEIER (for himself, and Mr. RODINO, Mr. EDWARDS of California, Mr. CONYERS, Mr. DANIELSON, Mr. DRINAN, Ms. HOLTZMAN, Mr. MAZZOLI, Mr. HARRIS, Mr. HUGHES and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(1) the term "institution" means any facility or institution—

(A) which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with, any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles held awaiting trial or residing for purposes of receiving care or treatment or for any other State purpose; or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;

(2) the term "person" means an individual, a trust or estate, a partnership, an association, or a corporation; and

(3) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

SEC. 2. Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with a State or political subdivision of a State is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available to persons residing in an institution as defined in paragraph (1)(B)(ii) of the first section of this Act only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States. The Attorney General shall sign the complaint in such action.

SEC. 3. (a) At the time of the commencement of an action under section 2 of this Act, the Attorney General shall certify to the court—

(1) that, at least thirty days previously, he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the State and the director of the institution of—

(A) the alleged pattern or practice of deprivations of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;

(B) the supporting facts giving rise to the alleged pattern or practice of deprivations, including the dates or time period during which the alleged pattern or practice of deprivations occurred and, when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged pattern or practice of deprivations; and

(C) the measures which he believes may remedy the alleged pattern or practice of deprivations;

(2) that he or his designee has made a reasonable effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the

appropriate State or political subdivision and the director of the institution, or their designees, regarding assistance which may be available from the United States and which he believes may assist in the correction of such pattern or practice of deprivations;

(3) that he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such deprivations and have not adequately done so; and

(4) that he believes that such an action by the United States is of general public importance and will materially further the vindication of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be signed by him.

SEC. 4. (a) No later than one hundred and eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections, promulgate minimum standards relating to the development and implementation of a plain, speedy, and effective system for the resolution of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility. The Attorney General

shall submit such proposed standards for publication in the Federal Register in conformity with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after such publication unless, within such period, either House of the Congress adopts a resolution of disapproval. The minimum standards shall provide—

(1) for an advisory role for employees and inmates of correctional institutions (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system;

(2) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(3) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(4) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance;

(5) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(b) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolu-

tion of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility, which may be submitted by the various States and political subdivisions in order to determine if such systems are in substantial compliance with the minimum standards promulgated pursuant to this section. The Attorney General may suspend or withdraw such certification at any time if he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated pursuant to this section.

(c) In any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult individual confined in any jail, prison, or other correctional facility, or pretrial detention facility, the court shall continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice, except that such exhaustion shall not be required unless the Attorney General has certified or the court has determined that such administrative remedy is in substantial compliance with the minimum acceptable standards promulgated pursuant to this section.

SEC. 5. The Attorney General shall include in his report to Congress on the business of the Department of Justice

prepared pursuant to section 522 of title 28, United States Code—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act;

(2) a detailed explanation of the process by which the Department of Justice has received, reviewed, and evaluated any petitions or complaints regarding conditions in prisons, jails, or other correctional facilities, and an assessment of any special problems or costs of such process, and, if appropriate, recommendations for statutory changes necessary to improve such process; and

(3) a statement of the nature and effect of the standards promulgated pursuant to section 4 of this Act, including an assessment of the impact which such standards have had on the workload of the United States courts and the quality of grievance resolution within jails, prisons, and other correctional facilities, and pretrial detention facilities.

Union Calendar No. 33

96TH CONGRESS
1ST SESSION

H. R. 10

[Report No. 96-80]

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 15, 1979

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. EDWARDS of California, Mr. CONYERS, Mr. DANIELSON, Mr. DRINAN, Ms. HOLTZMAN, Mr. MAZZOLI, Mr. HARRIS, Mr. HUGHES, and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 3, 1979

Additional sponsors: Mr. GUDGER, Mr. MATSUI, Mr. MIKVA, Mr. BUTLER, Mr. SAWYER, Mr. MOORHEAD of California, Mr. HYDE, Mr. HALL of Texas, and Mr. NOLAN

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

I—E●

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That as used in this Act—~~

~~(1) the term "institution" means any facility or institution—~~

~~(A) which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with, any State or political subdivision of a State; and~~

~~(B) which is—~~

~~(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;~~

~~(ii) a jail, prison, or other correctional facility;~~

~~(iii) a pretrial detention facility;~~

~~(iv) for juveniles held awaiting trial or residing for purposes of receiving care or treatment or for any other State purpose; or~~

~~(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;~~

~~(2) the term "person" means an individual, a trust or estate, a partnership, an association, or a corporation; and~~

(3) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

SEC. 2. Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, any official, employee, or agent thereof, or other person acting on behalf of or pursuant to a contract with a State or political subdivision of a State is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available to persons residing in an institution as defined in paragraph (1)(B)(ii) of the first section of this Act only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or

protected by the Constitution of the United States. The Attorney General shall sign the complaint in such action.

SEC. 3. (a) At the time of the commencement of an action under section 2 of this Act, the Attorney General shall certify to the court—

(1) that, at least thirty days previously, he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the State and the director of the institution of—

(A) the alleged pattern or practice of deprivations of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;

(B) the supporting facts giving rise to the alleged pattern or practice of deprivations, including the dates or time period during which the alleged pattern or practice of deprivations occurred and, when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged pattern or practice of deprivations; and

(C) the measures which he believes may remedy the alleged pattern or practice of deprivations;

~~(2) that he or his designee has made a reasonable effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding assistance which may be available from the United States and which he believes may assist in the correction of such pattern or practice of deprivations;~~

~~(3) that he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such deprivations and have not adequately done so; and~~

~~(4) that he believes that such an action by the United States is of general public importance and will materially further the vindication of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.~~

~~(b) Any certification made by the Attorney General pursuant to this section shall be signed by him.~~

~~SEC. 4. (a) No later than one hundred and eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections, promulgate minimum standards relating to the development and implementation of a plain,~~

~~speedy, and effective system for the resolution of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in conformity with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after such publication unless, within such period, either House of the Congress adopts a resolution of disapproval. The minimum standards shall provide—~~

~~(1) for an advisory role for employees and inmates of correctional institutions (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system;~~

~~(2) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;~~

~~(3) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;~~

~~(4) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance;~~

~~(5) for independent review of the disposition of grievances, including alleged reprisals, by a person or~~

other entity not under the direct supervision or direct control of the institution.

(b) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of persons confined in any jail, prison, or other correctional facility, or pretrial detention facility, which may be submitted by the various States and political subdivisions in order to determine if such systems are in substantial compliance with the minimum standards promulgated pursuant to this section. The Attorney General may suspend or withdraw such certification at any time if he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated pursuant to this section.

(c) In any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult individual confined in any jail, prison, or other correctional facility, or pretrial detention facility, the court shall continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice, except that such exhaustion shall not be required unless the Attorney General has certified or the court has determined that such administrative remedy is in

~~substantial compliance with the minimum acceptable standards promulgated pursuant to this section.~~

~~SEC. 5. The Attorney General shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code—~~

~~(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act;~~

~~(2) a detailed explanation of the process by which the Department of Justice has received, reviewed, and evaluated any petitions or complaints regarding conditions in prisons, jails, or other correctional facilities, and an assessment of any special problems or costs of such process, and, if appropriate, recommendations for statutory changes necessary to improve such process; and~~

~~(3) a statement of the nature and effect of the standards promulgated pursuant to section 4 of this Act, including an assessment of the impact which such standards have had on the workload of the United States courts and the quality of grievance resolution within jails, prisons, and other correctional facilities, and pretrial detention facilities.~~

That as used in this Act—

(1) the term "institution" means any facility or institution—

(A) which is owned, operated, or managed by or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles held awaiting trial or residing for purposes of receiving care or treatment or for any other State purpose; or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;

(2) the term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(3) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States; and

(4) the term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 2. Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, any official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available to persons residing in an institution as defined in paragraph (1)(B)(ii) of the first section of this Act only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States. The Attorney General shall sign the complaint in such action.

SEC. 3. (a) At the time of the commencement of an action under section 2 of this Act, the Attorney General shall certify to the court—

(1) that, at least thirty days previously, he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the State and the director of the institution of—

(A) the alleged pattern or practice of deprivations of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;

(B) the supporting facts giving rise to the alleged pattern or practice of deprivations, including the dates or time period during which the alleged pattern or practice of deprivations occurred and, when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged pattern or practice of deprivations; and

(C) the measures which he believes may remedy the alleged pattern or practice of deprivations;

(2) that he or his designee has made a reasonable effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the

appropriate State or political subdivision and the director of the institution, or their designees, regarding assistance which may be available from the United States and which he believes may assist in the correction of such pattern or practice of deprivations;

(3) that he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such deprivations and have not adequately done so; and

(4) that he believes that such an action by the United States is of general public importance and will materially further the vindication of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be signed by him.

SEC. 4. (a) No later than one hundred and eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections, promulgate minimum standards relating to the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adult persons confined in any jail, prison, or other correctional facility, or pretrial detention facility. The Attorney

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General shall submit such proposed standards for publication in the Federal Register in conformity with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after final publication unless, within such period, either House of the Congress adopts a resolution of disapproval. The minimum standards shall provide—

(1) for an advisory role for employees and inmates of correctional institutions (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system;

(2) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(3) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(4) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance;

(5) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(b) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolu-

tion of grievances of adult persons confined in any jail, prison, or other correctional facility, or pretrial detention facility, which may be submitted by the various States and political subdivisions in order to determine if such systems are in substantial compliance with the minimum standards promulgated pursuant to this section. The Attorney General may suspend or withdraw such certification at any time if he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated pursuant to this section.

(c) In any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult person convicted of a crime confined in any jail, prison, or other correctional facility, the court shall continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice, except that such exhaustion shall not be required unless the Attorney General has certified or the court has determined that such administrative remedy is in substantial compliance with the minimum acceptable standards promulgated pursuant to this section.

SEC. 5. The Attorney General shall include in his report to Congress on the business of the Department of Jus-

(2) a detailed explanation of the process by which the Department of Justice has received, reviewed, and evaluated any petitions or complaints regarding conditions in prisons, jails, or other correctional facilities, and an assessment of any special problems or costs of such process, and, if appropriate, recommendations for statutory changes necessary to improve such process; and

(3) a statement of the nature and effect of the standards promulgated pursuant to section 4 of this Act, including an assessment of the impact which such standards have had on the workload of the United States courts and the quality of grievance resolution within jails, prisons, and other correctional or pretrial detention facilities.

SEC. 6. This Act shall take effect on October 1, 1979.

Passed the House of Representatives May 23, 1979.

Attest: EDMUND L. HENSHAW, JR.,

Clerk.

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

Mr. KASTENMEIER. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 10) to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

The SPEAKER. The question is on the motion offered by the gentleman from Wisconsin (Mr. Kastenmeier).

The motion was agreed to.

IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 10, with Mr. Oberstar in the chair.

The Clerk read the title of the bill.

The CHAIRMAN. Pursuant to the rule, the first reading of the bill is dispensed with.

Under the rule, the gentleman from Wisconsin (Mr. Kastenmeier) will be recognized for 30 minutes, and the gentleman from Illinois (Mr. Railsback) will be recognized for 30 minutes.

The Chair recognizes the gentleman from Wisconsin (Mr. Kastenmeier).

Mr. KASTENMEIER. Mr. Chairman, I yield myself 8 minutes.

(Mr. Kastenmeier asked and was given permission to revise and extend his remarks.)

Mr. KASTENMEIER. Mr. Chairman, the bill that we take up today, H.R. 10, has very strong bipartisan support. It has the support of the House Judiciary Committee. It was reported out by that committee this year by a vote of 26 to 2. I want to thank the chairman and the number of people who contributed to it. It is similar to a bill (H.R. 9400) which passed the House, I might say overwhelmingly, last year by a vote of 254 to 69.

Unfortunately, last year the Judiciary Committee of the other body approved the bill, but in the waning moments of last year's session was unable to pass the comparable bill in the other body. Consequently, we have had to reprocess this bill again this year. It is a proposal to safeguard the constitutional rights of persons institutionalized in public institutions throughout this country, whether they be handicapped, prisoners, mentally retarded or impaired, the elderly, juveniles, the chronically ill; all such persons who have lost some of the freedom the rest of us share, and too often are abused.

This particular bill, I might add, Mr. Chairman, has the support of not only the administration, the Attorney General, the President, and others, but has the snpport of snch institutions as the American Bar Association, the National Mental Health Association, the National Association for Retarded Citizens, the Epilepsy Fonndation of America, the United Cerebral Palsy Association, the National Senior Citizens Law Center, the American Civil Liberties Union, the American Association of Retired Persons, the National Council of Senior Citizens, the Childrens Defense Fund, the National Coalition for Childrens Justice, and scores of local, county, and statewide organizations too numerous to mention who are concerned about the plight of citizens in institutions throughout the country.

As far as the prior history of this bill is concerned, the House in adopting the bill overwhelmingly last year did agree to an amendment which the committee had not included, namely, to put the prisoners in a separate category. Notwithstanding my own reservations abont the wisdom of that, and notwithstanding, I might also add, the position of the Department of Justice on the matter, the committee did substantially include the amendment of the gentleman from Pennsylvania (Mr. Ertel) as amended by the amendment of the gentleman from Illinois (Mr. Railsback) in the bill so that prisoners will only be protected insofar as their constitutional rights are concerned. We preserve that because it was clearly the indicated will of the House, and we have insisted on that, notwithstanding the feelings of some who feel that some of the worst abnses in the country happen to prisoners and we ought to afford them full access

through the Attorney General under this bill. I think it is clear that we have attempted to make the bill a reasonable bill, recognizing the interests of State institutions. What we have attempted to do is to provide a procedure to bring some order out of chaos where presently as Members well know, litigation is brought which sometimes has resulted in a situation where a district judge, at least in Alabama and elsewhere, has had to intervene personally and take charge of institutions to mandate certain courses of action. We, perhaps, are neglectful of our duty with respect to responding to some procedural structure whereby these rights might be vindicated, and we have only now through this bill attempted to bring some sort of order.

In addition to providing the initial right of the Attorney General to bring these suits where there is a pattern or practice and where grievous harm may be inflicted on inmates, in so doing we have placed a series of burdens on the Attorney General so that State officials, whether they be the Governor of the State, the attorney general of the State, the director of State institutions or whoever, may be fully aware and apprised of the situation and whereby a resolution of the problem can be had without resort to trials and the imposition of court orders, and the like, on State and local institutions.

In this regard, even though I assume there may be perhaps one or two organizations still opposing the bill, we did bring a great deal of language from the State Association of Attorneys General into it so that the attorneys general, Governors, and others may be duly notified and may be consulted by the Attorney General and so that the complaint can be rectified without some of the problems that exist today.

Mr. Chairman, this is not a money bill. This does not bring money into the system to rectify these harms. It is a procedural bill. In the next fiscal year—and I will offer an amendment to delay the effective date until October 1, 1979—we contemplate that this bill will cost $81,000 for the additional 3 more personnel in the Department of Justice. The Department of Justice does not intend to be, will not be empowered, and will not be in a position to pursue suits willy-nilly throughout the country.

It will be required to target the most egregious cases in America and follow the procedures which we have herein provided. The result is that there will not be a buildup in personnel in the Department of Justice, and this will not be affecting perhaps as many cases as opponents might think. It will serve, however, as a model, and the State and local institutions will be on notice that there is a national commitment, and this is the muscle, the ultimate muscle, to implement the national commitment to insure that people in institutions are not abused, brutalized, and dehumanized.

Mr. Chairman, I urgently request support for the bill, and I hope that the several amendments that may be offered will be resisted.

Mr. HARRIS. Mr. Chairman, will the gentleman yield?

Mr. KASTENMEIER. I yield to the gentleman from Virginia.

(Mr. Harris asked and was given permission to revise and extend his remarks.)

Mr. HARRIS. Mr. Chairman, I rise to congratulate and completely support the chairman in this very important legislation which I have cosponsored, and which I believe is very necessary for us to pass.

Mr. Chairman, as a member of the Judiciary Committee and a cosponsor of this bill, I want to add my voice of support for H.R. 10, protecting the rights of institutionalized persons. The House passed similar legislation in the previous Congress, only to see it die of inaction in the Senate. I am pleased that the House again is acting on this important legislation, and I urge its speedy enactment by the other body.

Many thousands of our fellow citizens—including many of our neighbors—have relatives or friends among the thousands in every community who are confined at one time or another to an institution. Juvenile facilities, nursing homes, correctional units or pretrail detention centers, and mental health hospitals all exist to serve important societal functions, but they must accomplish their missions in a way which deprives no American of the basic rights and privileges accorded and protected in the Constitution. While protecting these rights presents special challenges in an institutional setting, a citizen's rights are no less important because he or she is in a nursing home or mental health facility.

The legislation which our committee brings to the floor for your consideration today would not enlarge or otherwise affect existing law regarding the conduct of institutions. Rather, it gives standing for the United States, through the Attorney General, to bring civil actions to redress systematic deprivations of the rights of institutionalized persons.

The bill would enable the Attorney General to set minimum standards for the protection of these rights, and it includes safeguards against hasty or frivolous actions in this act by requiring: First, a 30-day notice period during which the Governor or chief executive officer is aware of problems and is informed of possible remedial steps available; second, a certification by the Attorney General that a reasonable time to make corrective steps has passed; and third, a finding by the Attorney General that conditions existing in a covered institution cause an individual to suffer serious harm or loss of rights protected by the Constitution.

Again, I would stress, this bill does not create or expand the rights of any citizen. Rather, it protects the rights which all Americans are entitled to enjoy.

UNWARRANTED FEARS

A portion of the debate on this bill will once again be devoted to the question of exempting those who are in jails, prisons, or other correctional facilities from coverage under the act. In my own State of Virginia, some State officials have objected to the bill, largely on the grounds that so many State resources now are involved in defending the State against prisoner complaints under section 1983 of the Civil Rights Act. Indeed, there are many complaints from inmates, as well one might expect in a State so slow to make reforms in aging penal facilities.

The eastern district court in Virginia led all jurisdictions in the Nation in the number of section 1983 suits filed, (833), and the western district ranked third in the Nation. However, the standards established in this act are required to be developed in consultation with prison employees as well as inmates; the bill further requires that existing State grievance procedures be exhausted before a person could bring a complaint to the Attorney General. These two provisions, establishing minimum standards and utilizing State grievance procedures, could actually reduce the proportion of cases in district court involving prisoner complaints. I point out that the proportion in my section of Virginia is currently 25 percent.

Mr. KASTENMEIER. Mr. Chairman, I thank the gentleman for his statement.

Mr. DRINAN. Mr. Chairman, will the gentleman yield?

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts.

(Mr. Drinan asked and was given permission to revise and extend his remarks.)

Mr. DRINAN. Mr. Chairman, I want to commend the gentleman in the well, the distinguished gentleman from Wisconsin (Mr. Kastenmeier), for his perseverance in this very important bill.

Mr. Chairman, I rise in support of this modest but important measure. As a cosponsor of the bill and a former member of the subcommittee from which it came, I am especially pleased to add my voice to the chorus of support H.R. 10 enjoys. This legislation seeks simply to give the Attorney General the authority to commence litigation, after complying with a number of procedural safeguards which the bill enumerates, to remedy unlawful conditions in certain institutions. Recent decisions in the Federal courts have cast doubt upon the "standing" of the United States to bring such suits. This legislation is intended to clarify any ambiguity which may exist regarding that authority.

It should be noted that the Supreme Court has, for many years, upheld the "standing" of the United States to initiate certain suits without express statutory authority. The Court has recognized that conduct of a specified nature, whether arising from public or private sources, may be so detrimental to the interests of the United States that the sovereign should be allowed to seek judicial relief even though no statute explicity provides for such suits. In the last century, when a labor strike threatened to prevent the movement of the U.S. mails, the Government sued to enjoin the obstruction. The Supreme Court sustained the authority of the United States to seek that relief without a specific statute in the Debs case.

In more recent times, the Court has reaffirmed that line of decisions. The Court has upheld the standing of the United States to bring civil suits without

express statutory authorization in at least cases where Congress has imposed criminal sanctions arguably covering the same conduct. In *Wyandotte Transportation Co.*, against *United States*, for example, the Court permitted the Government to institute a civil action based on a criminal statute to remove an obstruction in the Mississippi River.

The High Court approved the same theory of standing in the New York Times case, where the United States unsuccessfully sought to prevent the publication of the Pentagon papers. These precedents would appear applicable to civil actions brought by the Government involving deprivations of certain Federal constitutional and statutory rights of institutionalized persons to the extent Congress has made such conduct arguably a criminal offense, such as under sections 241 and 242 of title 18.

Despite these precedents, the lower Federal courts have not been as receptive to such suits as the Supreme Court. Thus, the United States has had mixed success in bringing suits to remedy the illegal conditions imposed in institutionalized persons. Where the Government has participated, however, it has been an effective advocate of the rights of those persons confined to or residing in such facilities and institutions.

In the *Gary W.* case, which is discussed in the committee report, the Attorney General intervened on the side of the plaintiff, who represented a class of dependent children sent to out-of-state institutions by Louisiana. The Justice Department investigation disclosed that these institutionalized children were "physically abused, handcuffed, beaten, chained, tied up, kept in cages, and overdrugged with psychotropic medication."

In the approximately 40 cases in which the United States has participated, similarly appalling conditions were uncovered. These institutional violations of Federal law were not confined to any one geographic area of the country, nor any single type of institution. The Department of Justice has found unlawful conditions of confinement and residence in many different States in varied institutional settings: Prisons, juvenile facilities, and mental hospitals.

I invite each Member of the House to examine carefully those pages of the committee report which document the abuses to which institutionalized children and adults have been subjected in facilities across the Nation. If these persons had an effective voice in our Federal Government, their cry of distress would have been heeded many years ago. Coming late as we do to this terrible problem, we should not pause in approving H.R. 10 which would give some measure of relief to persons subject to these awful conditions.

Undoubtedly there are some Members who harbor constitutional reservations about this bill. The committee carefully examined the assertions of invalidity and determined that no serious challenge can be made to H.R. 10. I will not repeat here what the committee said in its report at pages 7–9. In sum, the authority to grant the United States standing to initiate litigation to secure the rights of institutionalized persons rests a least in four grants of power: Section 5 of the 14th amendment, the commerce clause, the spending power, and the necessary and proper clause. Because most cases arising under this bill will involve violations of the 14th amendment, the committee focused its attention on the authority given by section 5.

From *Ex-parte Virginia* in 1879 to *Fitzpatrick* against *Bitzer* in 1976, the Supreme Court has consistently interpreted section 5 to permit Congress the broadest scope of authority to secure the rights, privileges, and immunities protected by the 14th amendment. What constitutes "appropriate legislation" within the meaning of section 5 is left exclusively to the judgment of the Congress. Only if the exercise of power intrudes into an exclusive domain of State authority will the statute be declared unconstitutional. Since H.R. 10 does not so intrude, putting aside its essential, procedural nature, its constitutionality is beyond peradventure.

It should be kept in mind that H.R. 10 authorizes the Attorney General to bring suits to correct a "pattern or practice" or violations of Federal statutory or constitutional proscriptions. Whatever constitutional reservations one might have, if the bill allowed Government suits to remedy mere isolated or accidental illegalities, should be dissipated when the pattern or practice nature of the litigation is considered. Such violations injure the United States itself, apart from any injury it may inflict upon institutionalized persons. Surely Congress may authorize the Government to sue to remedy conduct which causes injury to the sovereign.

The subcommittee which reported this bill and on which I had the privilege to serve, has been deeply interested in the area of corrections. When I first joined the subcommittee one of my first activities was to visit a number of State and Federal prisons throughout the Nation. Section 4 of H.R. 10 provides for the development of minimum standards for grievance resolution systems within correctional institutions. Adoption of the minimum standards by the States is entirely voluntary.

Department of Justice-assisted litigation challenging conditions of confinement in prisons and jails revealed that conditions in correctional facilities across the Nation were worse than those in mental institutions. As far back as 1967 the President's Crime Commission urged the establishment of grievance procedures in penal institutions "to provide a channel for the expression and equitable settlement of inmates grievances." The same recommendations have been made by the National Advisory Commission on Criminal Justice Standards and Goals, the American Correctional Association, and the National Council on Crime and Delinquency to name but a few.

In 1977, the Center for Community Justice, sponsored by an LEAA grant, undertook a study of prison grievance mechanisms. The study noted that the reason most cited in the general literature for the obvious interest of administrators in having grievance mechanisms is a desire to avoid violence and litigation. Underlying most major prisons riots, are festering unanswered grievances.

An effective grievance mechanism is not a panacea and will not end violent behavior in prisons, but it can provide for a steady flow of information on grievable matters to administrators, enabling them to understand and anticipate problems and provide solutions or explanations for the lack of solutions to the inmates. The American Correctional Association in its report, "Riots and Disturbances in Correctional Institutions," observed that "prompt and positive handling of inmates complaints and grievances is essential in maintaining good morale. A firm "no" answer can be as effective as granting his request, in reducing an individual inmates tensions, particularly if he feels his problem has been given genuine consideration by appropriate officials and if given reasons for the denial."

The minimum standards proposed in this legislation address the concerns of the American Correctional Association and the Center for Community Justice study. They are modeled on the California Youth Authority system which has been in operation since 1973. The standards provide for an advisory role for employees and inmates in the formulation, implementation, and operation of the grievance mechanism; specific time limits for replies to grievances; priority processing of grievances of an emergency nature; safeguards to avoid reprisals and independent review of the disposition of the grievance.

Section 4 of H.R. 10 also authorizes a Federal court in which an adult prisoner's suit filed under 42 U.S.C. 1983 is pending, to continue that action for a period not to exceed 90 days if the prisoner has access to a grievance resolution system which is in substantial compliance with the minimum standards promulgated under this legislation. Such limited continuance would be for the purpose of requiring exhaustion of the approved grievance resolution system.

As a safeguard to the prisoner, the legislation specifically requires the court to find that such action would be "appropriate and in the interest of justice." The court could not require continuance in those 1983 petitions which raise issues that conid not be resolved through the grievance mechanism. Section 4 of H.R. 10 is intended to serve the dual purpose of encouraging the establishment of grievance mechanisms in State correctional systems and of relieving the Federal courts of some of the burden of 1983 prisoner petitions.

This bill is an important contribution to the advancement of the constitutional and statutory rights of institutionalized persons. It is an extension of the authority of the Attorney General to bring suit in other areas of civil and constitutional rights. In the past Congress has authorized the United States to commence litigation in the areas of housing, voting, employment, public facilities, and other subjects. In addition we have given the Attorney General the right to sue for violations of antitrust, organized crime, environmental protection, and consumer credit laws. H.R. 10 is perfectly consistent with what we have done previously. No Member should have difficulty supporting this measure and I urge each of my colleagues to approve it.

Mr. KASTENMEIER. Mr. Chairman, I want to compliment the gentleman from Massachusetts (Mr. Drinan) for his contribution. Last year when he was a

member of the subcommittee, together with the gentleman from Pennsylvania (Mr. ERTEL) and the gentleman from Virginia (Mr. Butler), whose efforts are reflected in the bill as well as in some modest amendments agreed to this year.

Mr. RAILSBACK. Mr. Chairman, I yield myself so much time as I may consume.

Mr. Chairman, I rise in support of H.R. 10. I want to endorse what the chairman of our subcommittee has said. In addition, this legislation enjoys strong Republican support. Nine of the 11 Republicans on the Judiciary Committee voted favorably to report this legislation to the floor. Similar legislation was originally submitted by the Ford administration.

Mr. Chairman. I would like to make a couple of additional points if I may.

First. H.R. 10 will not create a whole new panaply of rights for these people. It creates no new rights for anyone nor would it substantially change existing practice of the Department of Justice. We have been assured that the Department will use this authority sparingly. For years the Department has been intervening, often times at the request of the courts, in cases against certain State officials for the conditions of their institutions. Over the last 10 years the Department has been involved as intervenor in about 40 such cases, and initiated 2 to 3. One difference, however, is that the Department has been involved in these suits, until recently, with much broader authority than they have under H.R. 10, and no one has suggested that they have gone crazy, suing State officials all over the country.

Second. H.R. 10 codifies a notice procedure, which was nonexistent prior to the *Solomon* case, and clarifies the Department's authority. The bill requires State action: There must be a pattern or practice of violations which causes these people to suffer grievous harm and deprives them of any rights, privileges or immunities secured by our Constitution; it must be a case of general public importance; and there must be notice and a period of negotiation with the State.

Third. Lest you think that there has not been a demonstrated need for this legislation, here are just a few of the authenticated cases.

In the *Morales* against *Turman* (a case begun in 1973 with appeals finally decided in 1977) challenging conditions in Texas' five juvenile detention facilities, the Justice Department was ordered by the court to appear as litigating amicus. After a year of discovery and 6 weeks of trial, the court determined that the staff was engaging in a "widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates." Brutality was found to be "a regular occurrence * * * encouraged by those in authority." Juveniles were teargassed. Selected youth were confined in cells lacking "the minimum bedding necessary for comfortable and healthful sleep," while others were denied regular access to bathroom facilities. Some were placed in homosexual dormitories as a form of punishment.

In the case of *Wyatt* against *Stickney* in 1971, the record revealed that Alabama's mental hospitals were severely overcrowded and understaffed. Retarded persons were tied to their beds at night in the absence of sufficient staff to care for them. One participant was regularly confined in a straitjacket for 9 years, as a result of which she lost the use of both arms. The State ranked 50th in the Nation in per patient expenditures and the less than 50 cents per patient per day spent on food expenditures resulted in a diet "coming closer to punishment by starvation than nutrition."

The conditions documented in *Wyatt* were not unique to Alabama facilities. In a suit challenging the adequacy of care at New York's Willowbrook State School for the Mentally Retarded, the trial record revealed equally appalling conditions. Participating as litigating amicus, the Department assisted plaintiffs in producing evidence of massive overdrugging of retarded children by staff, and physical abuse of weaker residents by stronger ones. In the absence of adequate supervision, children suffered broken teeth, loss of an eye, and loss of part of an ear bitten off by another resident. In an 8-month period, the 5,000 resident facility reported over 1,300 incidents of injury, patient assault, or patient fights. Unsanitary conditions led to 100 percent of the residents contracting hepatitis within 6 months of their admission. The trial court characterized conditions at Willowbrook as "shocking," "inhumane," and "hazardous to the health, safety, and sanity of the residents."

In a case decided in December 1977 by the court in the eastern district of Pennsylvania concerning the Pennhurst State School and Hospital, a large residential institution for the mentally retarded, the court found that physical restraints are used excessively because of staff shortages, and that these restraints are potentially physically harmful and have, in fact, caused injuries and at least one death. Dangerous psychotropic drugs are often used for control of patients

and for the convenience of staff rather than for treatment or habilitative purposes. The side effects of such drugs, besides general lethargy, include hypersensitivity to sunlight, inability to maintain balance, and a gum condition marked by inflammation, bleeding, and increased growth.

The court concluded that this large, isolated institution which had been in use since 1908 was an inappropriate and inadequate facility for the habilitation of retarded persons when judged in light of the presently accepted professional standards of care. I think it is significant to note the court's findings that although the State legislature had in November 1970, appropriated $21 million for the purpose of planning, designing, and constructing community-based facilities which would enable 900 Pennhurst residents to be transferred to a more appropriate environment, 7 years later only 37 residents had directly benefited from the legislation. Equally significant is the court's findings that such community-based facilities are, in the long run, less expensive to operate than large facilities such as Pennhurst. This case is presently on appeal before the third circuit.

I could go on, Mr. Chairman. The problems are well documented. There are serious problems which are very real to those people and families involved. To the most imaginative, many institutions in this country are no more than human warehouses. They warehouse the young, the old, the feebleminded, the sick. We are talking about approximately 1 million persons who reside in these institutions. They are the most vulnerable people in our society. I can assure you that there are very few lobbyists waiting to see you on this legislation. You can also be assured that there are very few votes to be gained by supporting it, but I can assure you that this bill is a good faith, modest effort to try and help these people obtain some decent, humane treatment, and living conditions.

Mr. KASTENMEIER. Mr. Chairman, will the gentleman yield?

Mr. RAILSBACK. I would be happy to yield to the gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I would like to take this time to commend the gentleman from Illinois (Mr. Railsback). He is largely responsible for inclusion of section 4 in its present form. He participated notably in the other parts of the bill, and his concern, his long-held concern, for juveniles in this country is reflected, also, I might add, in this bill.

Mr. RAILSBACK. Mr. Chairman, I thank the gentleman very much.

Mr. KASTENMEIER. Mr. Chairman, I yield such time as he may consume to the gentleman from Maryland (Mr. Mitchell).

(Mr. Mitchell of Maryland asked and was given permission to revise and extend his remarks.)

Mr. MITCHELL of Maryland. Mr. Chairman, I rise to lend my unwavering support for the measure before us today. The very essence of H.R. 10, a bill which authorizes the U.S. Attorney General to initiate civil actions to protect the rights of institutionalized persons and to encourage the development of grievance mechanisms in correctional facilities, is that it addresses the issue of humanity and justice.

The underlying philosophy of the human rights concept points to a commitment of our conscious effort to strive for the application of fairness and equity. The concern for human rights and the application of fairness and justice is supposedly pertinent to all citizens. Therefore, at no point should the particular status of an individual preclude his or her rights as a citizen.

It is paramount that we address the fundamental question of this issue: Is the person less of a citizen because he or she may be one who is institutionalized in special facilities; that is, for the mentally ill, handicapped, incarcerated, youth awaiting trial, or nursing home patient? Assuming that the answer to this question is overwhelmingly negative, I submit that we should not have any reservations regarding the passage and subsequent enactment of H.R. 10.

The Civil Rights of Institutionalized Persons, H.R. 10, grants the Attorney General the authority to bring suit in Federal district courts only if he has reasonable cause to believe that persons residing in one of the aforementioned institutions are subject to conditions which cause them to suffer grievous harm and deprivations of rights, privileges or immunities secured or protected by the Constitution or laws of the United States, and that such deprivations are part of a pattern or practice. Suits on behalf of inmates of jails, prisons or other correctional facilities may be brought only to secure rights protected by the Constitution. Our support for this measure should be a firm reflection of our commitment to the elimination of a double-standard with regard to the application of fairness, justice and equity.

Many of us may not lend our support to H.R. 10 because its provisions apply to coverage for inmates of jails, prisons, and other correctional facilities. This is particularly disturbing to me. For whatever reason, some fail, either consciously or unconsciously, to recognize the frequency with which incarcerated persons must live within an inhumane environment and under severe economic constraints.

At the same time, some may applaud the existing rights of institutionalized persons to initiate private suits to redress violations of their constitutional rights as more than adequate—particularly as they relate to the incarcerated. I submit that any attempts to exclude the incarcerated from the provisions of H.R. 10 reek of the mentality that our Nation's prisoners should be continually forced to live under a system which fosters the existence of humiliation, denial, subserviency, and frustration within the confines of many penal institutions. I sincerely hope that the Members of this body reject any such attempts.

I do not think that there is one Member of this body who will deny his or her dedication and commitment to the principle of fairness and equity. Still further, not one of us wants to see a different set of criteria utilized for the administration of justice to the handicapped, mentally or chronically ill, youth, or nursing home patients. I am not going to assume that all of us feel this way about the the incarcerated. That, notwithstanding, the passage of H.R. 10 is crucial to the legal, as well as the human rights of institutionalized persons. I am urging that you give this measure your support, and more importantly, your vote.

Mr. KASTENMEIER. Mr. Chairman, I yield such time as he may consume to the gentleman from Texas (Mr. Hall).

Mr. HALL of Texas. Mr. Chairman, I would like to associate myself with the passage of this measure. It is a much better bill than was presented last year. The very able, dedicated leadership of both the chairman of the Committee on the Judiciary and the chairman of the subcommittee has been of utmost importance and great value to producing a bill, today, that I think this body should approve.

Mr. KASTENMEIER. Mr. Chairman, I yield such time as he may consume to the distinguished chairman of the Committee on the Judiciary, the gentleman from New Jersey (Mr. Rodino).

(Mr. Rodino asked and was given permission to revise and extend his remarks.)

Mr. RODINO. Mr. Chairman, I rise in support of H.R. 10, which was reported favorably by the Committee on the Judiciary by the overwhelming vote of 26 to 2.

This legislation is a significant step in the Nation's effort to protect rights guaranteed under the Constitution and laws of the United States to a particularly vulnerable and inarticulate group who are institutionalized—children, the elderly, mentally impaired and chronically ill persons, and prisoners.

The main purpose of this legislation is to grant a clear right of "standing" to the Attorney General to initiate a civil action to remedy conditions of institutionalized persons when State action is systematically depriving these persons of their basic rights. The case must be considered a matter of "general public importance."

I have received numerous letters of support for this and similar legislation over the past 3 years. These letters have been sent by a wide variety of supporters: Families and friends of institutionalized persons, staff at institutions, mental health and retardation organizations, the American Bar Association, the American Civil Liberties Union, public officials, and many other persons and groups. Attorney General Bell and his predecessor, Attorney General Levi, have both endorsed this legislation, and in fact have requested it.

The Secretary of the Department of Health, Education, and Welfare—the Honorable Joseph A. Califano—is a strong supporter. He has written to me—

"The legislation is necessary and desirable to establish a definitive point at which the Attorney General can intercede on behalf of institutionalized persons whose rights may not otherwise be protected.[1]"

The urgent need for this legislation is very apparent, as we weekly and sometimes daily learn of abuses to institutionalized persons. The hearing records in this and the 95th Congress document many of these abuses: Mental patients tied to their beds at night in the absence of sufficient staff; confinement of a mental

[1] Hon. Joseph A. Califano, letter dated July 20, 1977, to Hon. Peter W. Rodino, Jr. Hearings on H.R. 2439 and H.R. 5791 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., First Sess., Serial No. 28, at 466–67 (1977).

patient to a straitjacket for 9 years, resulting in the loss of the use of both arms. Many of these conditions have been characterized as debilitating, shocking, inhumane, and an immediate and intolerable threat to the safety and security of residents and staff. The conditions in many institutions are unfit for human habitation.

Recently the conrts bave been the ultimate forum responsible for remedying these conditions, only becanse many States and public agencies have failed to meet their responsibilities. However, I would like to note for the record, that my own State—New Jersey—has been in the forefront of protecting institutionalized persons. The Honorable Stanley C. Van Ness is the New Jersey Public Advocate, directing a department which by statute has the responsibility and authority to act on its own motion to address many of the concerns that would be faced by the Attorney General under H.R. 10. Many of the institutionalized persons are "the poor, the minorities, the voiceless, and those isolated from the mainstream of the majoritarian, democratic political system," according to the Public Advocate. Most of the cases brought by the Public Advocate have been resolved by negotiation, without the need to resort to litigation. It is expected that the Attorney General under H.R. 10 will be able to resolve some cases by negotiation and settlement, particularly since the precertification procedures reqnire consnltation with and advice to State and institutional officials. However, it is necessary that the Attorney General have the power to initiate a civil action, if necessary.

The Honorable Stanley Van Ness and bis department of the public advocate are on record as being strong supporters of H.R. 10. Testimony bas been delivered personally during tbe 95th and 96th Congresses by the department. In that testimony the department has defended tbe constitutional validity of the legislation, noting that it creates no new rights but merely provides a mecbanism for the enforcement of existing rigbts.

The department has rebutted the intolerable argument tbat States "cannot 'afford' to treat tbem (institutionalized persons) with humanity."

"The deprivation by a State of Fundamental constitutional rigbts can never be jnstified by a claim of inadequate fiscal resources. A State is not free, for budgetary or other reasons, to provide a social service in a manner which results in the denial of individnal constitntional rigbts. The choice between administrative convenience and economy on tbe one hand, and federal privileges and immnnities on the other hand, has already been made by those who drafted our federal Constitution and the States that agreed to abide by its dictates." [1]

In closing, I wonld like to stress that the New Jersey public advocate has endorsed all the provisions of H.R. 10 including section 4 which encourages the voiuntary development of correctional grievance mechanisms, and authorizes a court to continue a prisoner petition under 42 U.S.C. 1983 for up to 90 days if an effective mechanism is in place and has not been used.

I urge the Members to snpport H.R. 10 without any amendments, except for tbe one technical amendment wbich the gentleman from Wisconsin (Mr. Kastenmeier) will offer. To support this recommendation, I am inserting a copy of an excellent letter from the Attorney General which rebuts the suggestions made by the gentleman from Obio (Mr. Kindness). This legislation is carefnlly drafted and deserves yonr full support.

The letter follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 2, 1979.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that Representative Kindness intends to offer several amendments to H.R. 10, Civil Rights of Institntionalized Persons, when the bill is considered by the House of Representatives in the near fnture. I feel it is important to address several misapprehensions about tbe legislation that are evidently shared by Mr. Kindness and some otber Members of Congress.

[1] Testimony of Laura LeWinn, Deputy Director, Division of Mental Health Advocacy, Office of the New Jersey Public Advocate. Hearings on H.R. 10 before tbe Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Honse Committee on the Jndiciary, 96th Congress First Session, Feb. 15, 1979.

H.R. 10 would not in any way grant the Attorney General the power to mandate any actions by state or local governmental entities. Nor would it enlarge existing legal obligations of state and local governments. The bill merely makes clear that the Department of Justice may initiate litigation where persons confined in covered institutions are, on a wide-spread and systematic basis, subjected to treatment that denies them existing federal statutory or constitutional rights. The ultimate findings and determination of remedies in these lawsuits will continue to lie with the courts, as it does in private litigation. The Attorney General would continue to bear the responsibility for ensuring that federal jails and prisons comply with constitutional standards.

Another significant provision of the legislation requires this Department to develop, after extensive consultation with interested governmental and nongovernmental parties, minimum standards for correctional grievance procedures. The bill does not require any State to adopt such standards. It does provide, however, that in the case of States which do so, prisoner lawsuits pursuant to 42 U.S.C. 1983 will not proceed until the grievance process has been completed.

I am opposed to assertions of Federal control over those matters that are fundamentally the responsibility and right of nonfederal entities to address, and I believe this view is consistent with the proper role and mandate of this Department throughout its history. However, it is vital that the nation's law enforcement agency have legal standing to vindicate the federal rights of institutionalized persons when those rights have been infringed by officers or agents of state and local governments. The entire body of federal civil rights statutes is grounded in part on the proposition that state and local governments must obey the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and that the federal government should have the statutory authority to protect groups which are unable to adequately protect themselves from patterns of deprivation of Constitutional rights. H.R. 10 should be viewed as a natural and appropriate improvement in the statutory scheme for federal civil rights enforcement.

The Judiciary Committee is to be commended for its strong endorsement of this important legislation. I look forward to its early passage by the full House of Representatives.

Yours sincerely,

GRIFFIN B. BELL,
Attorney General.

Mrs. FENWICK. Mr. Chairman, will the gentleman yield?

Mr. RODINO. Mr. Chairman, I yield to my colleague, the gentlewoman from New Jersey (Mrs. Fenwick).

Mrs. FENWICK. Mr. Chairman, I thank my colleague for yielding.

I would like to speak on behalf of this legislation. I worked in these fields in New Jersey before I ever came down here. I was chairman of our legislative commission on the study of child abuse and other aspects of child welfare and I worked, too, among the elderly, and in our prisons.

We desperately need some way to make sure that the rights of these people can be secured. We have no such a vehicle now. I think that the legislation is most important in that regard.

I honor the Committee on the Judiciary for its work.

Mr. RODINO. Mr. Chairman, in conclusion, I urge the committee to adopt this legislation, with the one technical amendment that is being presented by the chairman of the subcommittee.

Mr. RAILSBACK. Mr. Chairman, I yield 3 minutes to the distinguished ranking minority Member, the gentleman from Illinois (Mr. McClory).

(Mr McClory asked and was given permission to revise and extend his remarks.)

Mr. MCCLORY. Mr. Chairman, I rise in support of H.R. 10. I want to commend the chairman of the subcommittee, the gentleman from Wisconsin (Mr. Kastenmeier), and the ranking minority member, my colleague, the gentleman from Illinois (Mr. Railsback), and I want to comment the Committee on the Judiciary for its work on this important legislation. H.R. 10 was reported by the Committee on the Judiciary with a strong bipartisan endorsement. Its primary purpose is to permit the Attorney General of the United States to initiate civil suits to protect the rights of institutionalized children, the elderly, the mentally impaired, and prisoners. Originally, this bill came to the Congress in 1975 as a recommendation of the Ford administration.

Under this bill the Attorney General is permitted to take such action only if be believes that such rights deprivation is part of a pattern or practice of denial, and only after proper notice and consultation with the appropriate State official. No standing is created by this legislation to pursue purely private conduct no matter how discriminatory or wrongful.

In the past, Congress has not hesitated to give tbe Attorney General statutory authority to engage in litigation to secure citizens' basic constitutional rights where evidence has shown a widespread denial of sucb rights. In seeking to remedy discrimination in voting, public accommodations, employment and housing, we bave anthorized tbe Attorney General to commence litigation to correct a pattern or practice of unlawful conduct. The authority proposed in H.R. 10 is neither novel in concept nor unprecedented in use.

Another important part of this legislation is intended to help relieve some of the bnrden which prisoners' grievances frequently place on our Federal district conrts. Last year, over 9,000 prisoner petitions under section 1983 were filed in Federal courts, comprising 8 percent of the total number of civil cases filed. H.R. 10 contains a provision tbat would allow courts to continue cases brought by State prisoners under 42 U.S.C. 1983 in order to permit the aggrieved person to make use of his State's administrative grievance procednre prior to trying to litigate the issne in Federal court. If the inmate is not satisfied with the result received, he may still use 1983. Such petitions filed by an inmate are lengthy and handwritten, without tbe assistance of a lawyer. A total of 96 percent of these petitions are dismissed witbout trial. Last year in the northern district of Illinois which embraces my congressional district, 377 petitions were filed, which was a 30-percent increase over tbe number filed in 1977. The northern district was the fourth highest in the Nation in the number of 1983 cases filed. In tbe soutbern district of Illinois 65 cases were filed in 1978 wbich represents a 400-percent increase over 1977. H.R. 10 would go a long way in helping these courts with their ever-growing caseload.

It is important to point out, Mr. Chairman, that this legislation imposes no new obligations on State or local governments or their officials. The scope of tbeir responsibilities to obey Federal constitutional proscriptions is neither enlarged nor contracted under H.R. 10. The bill has no effect, one way or tbe other, on existing rigbts, privileges, and immunities. Tbe only purpose of the measure is to give the Attorney General the autbority in tbose cases where a pattern and practice has developed of systematic violations of the rights of institutionalized persons. This legislation establishes a mechanism or procedure for protecting the constitutional rights of institutionalized persons. I urge my colleagnes to support the passage of this legislation.

Mr. KASTENMEIER. Mr. Cbairman, I yield 3 minutes to the distinguisbed gentleman from Connecticnt (Mr. Dodd).

(Mr. DODD asked and was given permission to revise and extend his remarks.)

Mr. DODD. Mr. Chairman, I thank tbe gentleman for yielding.

Mr. Chairman, mncb of wbat I had prepared in my remarks has been stated by others who have preceded me. I would like to join witb the others who have complimented the chairman of the subcommittee, the gentleman from Wisconsin, as well as tbe ranking minority member, for the work tbey have done in bringing this legislation to the floor for the consideration of tbe full House.

I think it is appropriate to mention again what was stated by my colleague and friend, tbe gentleman from Illinois (Mr. Railsback) that today as we wait at our respective doors, my friends on that side of the aisle and those of us sitting on tbis side of the aisle, there will be no one standing over at the corridor witb tbeir tbumbs in a vertical or up-and-down position asking us to support or not support tbis legislation.

The people who will be looking to benefit rather under tbis bill are people who will be lobbying ns through their silence and through their absence.

Mr. Cbairman, I rise in support of H.R. 10.

This bill seeks to protect the civil and constitutional rigbts of millions of people in this country. In my district and in every congressional district tbere are thousands of people wbose rights this bill seeks to protect. Yet, as we prepare to vote on tbis legislation, tbose who would directly benefit, those whose rigbts we are considering are not here lobbying for our votes. They cannot be here. They are in our institntions—our nursing homes, our prisons, our orphanages, onr homes for tbe developmentally disabled, and our mental hospitals.

They cannot come here to tell us how badly they need this legislation, but they have sent us a message through their absence—not merely through their physical absence, but more strikingly through the silence in our mail and on our phone lines. We do not hear their voice; that is the message. They cannot reach out; we must reach in.

We do not hear their voices because many institutionalized persons are unable to communicate with us due to their physical or mental condition, and many others have long since stopped believing that there is anyone out here who cares.

The message in the silence is the key to this bill. The institutionalized persons in this country need a voice so that deprivations of their rights do not go unremedied, they need a voice because many have suffered, and although there are many well-run institutions in this country, in many others, people are still suffering grievous harm and deprivations of their constitutional and civil rights. Institutional abuse is not a problem which is confined to any particular State or region of this country; it is a national problem. In Alabama's mental hospitals, some retarded persons were tied to their beds at night in the absence of sufficient staff to care for them, and one patient was regularly confined in a straitjacket for 9 years, as a result of which she lost the use of both arms. In New York's Willowbrook facility, retarded children were massively overdrugged by the staff; a child suffered the loss of an eye and another the loss of part of an ear. In Texas' five juvenile facilities, a Federal court determined that the staff was engaged in "a widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates * * *." In Oklahoma's State penitentiary system, inmates were sleeping in garages and stairwells, and eating out of kitchens infested with mice, rats, and vermin. In a Mississippi State prison, exposed wiring posed a constant danger of fire, dead rats surrounded the barracks, and broken windows were stuffed with rags to keep out the cold and rain.

The cases I have just described are noted in the committee's report on this bill. I take the time to repeat them now, just as I and some of my colleagues have in the past recited the stories of Soviet dissidents whose human rights are being violated. We must not turn our backs on those who are suffering gross violations of human rights: We must not cease in our efforts to bring these abuses to the public's attention. And for the millions of institutionalized persons in this country, ill and mentally retarded. They are, therefore, providing services on behalf of the State, and if these allegations are true, a court may very likely find "State action" under the 14th amendment.

Another example from my home State involves a suit presently pending in the Federal district court against a State institution for the mentally retarded, the Mansfield Training School. In that suit the Connecticut Association of Retarded Citizens allege, among other things, that persons institutionalized at Mansfield do not receive "necessary services, including personal care and protection, occupational services, and rehabilitative training." And they allege that "physical and pharmaceutical restraint procedures are frequently utilized for convenient control of residents and as a substitute for appropriate care and programs of rehabilitation."

These allegations are now before a Federal Court which will determine which, if any, of these allegations are valid, and what, if any, remedy is appropriate. Again, I emphasize that this is a national problem for which we ueed a national solution.

We should not leave institutionalized persons to find their only spokesmen in the understaffed and overburdened offices of civil liberties organizations and poverty lawyers. The message of the silence tells us that the voice we provide must be strong. As Judge Bazelon has written.

"Those without voices they can raise, those submerged by what has engulfed them—it is those people we must attend."

I urge my colleagues to vote in favor of H.R. 10. We must do more—we must insure that they have a voice by giving the Attorney General the right to seek a remedy for systematic deprivations of their rights.

At present, in my own State of Connecticut, allegations of institutional neglect have been made against two nursing homes. The allegations include charges that these facilities provide inadequate heating; that they lack the necessary equipment and supplies; and that patients are suffering physical harm from improper positioning and improper or inadequate feeding programs. These facilities are privately owned, but they receive State and Federal support for

over 80 percent of their patients, and a substantial number of their patients have been transferred to these facilities from State institutions for the mentally ill.

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

Mr. RAILSBACK. Mr. Chairman, I yield 4 minutes to the gentleman from Virginia (Mr. Butler).

Mr. Chairman, I would just like to say that the gentleman from Virginia has worked extremely hard on this legislation and I think deserves a lot of credit.

Mr. BUTLER. Mr. Chairman, I thank the gentleman from Illinois for his kind words.

I appreciate the contribution that the subcommittee has made to this bill and the hard work they have done this year. I was not privileged to serve on the subcommittee in the 96th Congress, but I worked closely with it as a member in the 95th. I am pleased with the product and I think the improvements that have been made this year are salutory, and that we have an even better bill than the one that passed the House last year.

Mr. Chairman, I rise in support of H.R. 10. Most Members of this body are well aware of the conditions that exist in our nursing homes and in our mental and penal institutions throughout the country. Some institutions do an outstanding job and perform a valuable service to the community. Other institutions leave a great deal to be desired. But there are still others that are absolutely outrageous and unacceptable. H.R. 10 would address itself primarily to this latter category and then only if such facility is owned, operated, or managed by or on behalf of the State. In other words, there can be a privately owned nursing home out there which may be the worst in the country, but if it is not operated by or on behalf of the State, this legislation cannot be invoked to correct the situation. However, a State arrangement whereby it contracts with a private institution to care for persons committed to the care of the State would be covered.

All private nursing homes are in some way licensed by the State. This is not what constitutes "State action" for the purpose of H.R. 10. That is to say, a State license, State money, State regulation, tax exemptions or Federal money would not singularly or collectively be adequate involvement of a private nursing home with the State to trigger this legislation.

Section 4 of H.R. 10 provides that in certain cases a Federal judge may require a State prisoner, who has filed a 1983 petition, to go back and exhaust his State grievance procedure.

Last year, Virginia's eastern Federal district lead the Nation with the number of 1,983 suits filed 833, a 59 percent increase over 1977, and the western district was number three in the Nation. Prisoner cases comprise over 25 percent of the eastern district's civil docket. I contacted the office of the attorney general of Virginia and found that five assistant attorney generals, three paralegals, and two secretaries, and probably others, spend their full-time investigating and responding to prisoner complaints in Federal court.

H.R. 10 would go a long way toward helping us in our Federal courts in Virginia. Under existing law there is no requirement that a complainant first ask the State prison system to help him. He can file his grievance directly in the Federal court and his case has to be investigated by that court, and the State defended by the State's attorney general's office.

While drafting this legislation we were concerned that the U.S. Attorney General may desire, under H.R. 10 to set up a large bureaucracy, and we requested and received assurance from the Department of Justice that there would be very little increase in staff as a result of the enactment of H.R. 10. The Department testified before our subcommittee that:

"At the present time we have a special litigation section which is responsible for our institutions litigation and it presently has a staffing of 30 people; 18 attorneys, and the others are professional and clerical personnel. It would be our expectation that with the enactment of this legislation that we would not increase appreciably the number of suits that we have been involving ourselves in."

According to our Congressional Budget Office's analysis of H.R. 10: "It is estimated that these tasks will require two additional attorneys and one additional clerical position, at a cost of $81,000 in fiscal year 1980."

This legislation came to Congress as a recommendation of the Ford administration. In my opinion, it will have a very positive benefit for my State of Virginia. I urge your support.

Mr. KASTENMEIER. Mr. Chairman, will the gentleman yield?

Mr. BUTLER. I yield to the gentleman from Wisconsin.

[Mr. Kastenmeier addressed the Committee. His remarks will appear hereafter in the Extensions of Remarks.]

The CHAIRMAN. The time of the gentleman from Virginia (Mr. Butler) has expired.

The Chair will advise the Members that the gentleman from Wisconsin (Mr. Kastenmeier) has 13 minutes remaining and the gentleman from Illinois (Mr. Railsback) has 14 minutes remaining.

Mr. KASTENMEIER. Mr. Chairman, I yield 2 minutes to the distinguished gentleman from Florida (Mr. Pepper), a member of the Committee on Rules.

(Mr. Pepper asked and was given permission to revise and extend his remarks.)

Mr. PEPPER. Mr. Chairman, I thank the distinguished gentleman from Wisconsin for yielding to me for a brief time.

Mr. Chairman, I am pleased to be recorded in support of H.R. 10. This bill, as I understand it, will give the Attorney General of the United States clear authority to institute a civil action to redress pattern of deprivation of civil rights of institutionalized persons, including institutionalized children, prisoners, persons being cared for in our mental health institutions, and our institutionalized elderly. While I believe the constitution already affords these protections, certain recent court decisions have necessitated this clarification. If the civil rights of individuals are being abused in the presence of State action then the Federal Government has not only a legal responsibility but a moral obligation to intercede. I commend my distinguished colleague from Wisconsin (Mr. Kastenmeier) and members of his committee, for their efforts in bringing this measure to the floor. It is an important bill as a major step toward protecting the basic rights of institutionalized persons.

It is fortunate that the National Conference on Mental Health and the Elderly, sponsored by the Select Committee on Aging, had the opportunity to consider H.R. 10 just weeks in advance of the floor debate today. Over 300 delegates from nearly all 50 States, representing major national organizations concerned with mental health and the elderly, met in the House of Representatives to draft and consider legislative measures to address the unmet needs of our elderly with mental problems. To protect the rights of those confined in mental institutions, the delegates to the National Conference endorsed unanimously H.R. 10 and urged that the protections embodied in this legislation be extended to those in nursing homes.

I am delighted to see that nursing homes as well as those facilities which provide custodial, long-term or residential care will be included within the scope of this legislation. As chairman of the House Select Committee on Aging, I have heard testimony from numerous witnesses documenting instances in which the rights of patients are infringed, where persons are involuntarily committed or released from institutions without provisions for care, or where such persons live in fear that complaints about inadequate care or attempts to seek better care would inevitably lead to further hardship. Unfortunately, these circumstances have been allowed to persist in many cases because of lack of authority, direction, or will to redress the grievances. This legislation is a strong step toward correcting these problems.

Under H.R. 10, if a pattern or practice of abuse is found to exist within an institution which is owned, operated, or managed, in whole or in part, by a State or a political subdivision, then corrective action will be reachable by Attorney General suit. In addition, the Attorney General may bring suit if a facility or institution provides services on behalf of any State or political subdivision. In short, this legislation will provide redress for our institutionalized when it can be established that State action has led to a pattern or practice of abuse in nursing homes or facilities which provide custodial, long-term or residential care.

Mr. Chairman, it is time that the States and other political entities take action to safeguard the health and safety of these helpless and dependent individuals who are victims through no fault of their own. We should not tolerate conditions such as those which led to the loss of 44 lives in three boarding homes for the elderly last month. Nor should we allow the placement of elderly in facilities without adequate care, clothing or shelter. Unfortunately, thousands of former elderly mental patients and the handicapped are being transferred into substandard facilities sometimes known as foster care homes, halfway houses, or shelter care facilities. Patients are being housed in old hotels, mobile homes or old

nnrsing homes, few of which offer psychiatric, recreation or rehabilitation services. In sum, we are playing musical chairs with needy people. We move people from State hospital to nursing home to hoarding home with little followup to determine if patients have been properly placed or adequately cared for. Where States act irresponsibly and seriously abnse the rights of our institutionalized, this bill will hold the States and other involved accountable for their acts.

Mr. Chairman, I nrge immediate passage of this important measnre.

Mr. RAILSBACK. Mr. Chairman, I yield 3 minutes to the gentleman from New York (Mr. Fish).

Mr. Fish asked and was given permission to revise and extend his remarks.)

Mr. FISH. Mr. Chairman, I thank the gentleman very much for yielding this time to me.

I want to add my expression of gratitude to both the chairman of the subcommittee and the ranking minority member for the work product they have hronght before ns.

Mr. Chairman, I rise to offer by snpport to H.R. 10. The primary pnrpose of this legislation is to provide express statutory authorization for the Attorney General of the United States to initiate civil actions to redress systematic deprivations of rights of institutionalized persons.

The protection of the rights of institutionalized persons, while primarily the responsibility of the officials who operate the institntions, is a matter of concern to the United States—when rights guaranteed under the Constitution or laws of the United States are being violated by official action. Over 1 million persons reside in institutions throughout the Nation. These people are generally very vulnerable to abuse. They are usnally inarticulate, powerless, and unaware of their rights.

I can understand a State's reluctance to support this legislation. There may be a conflict of interest between the State and the people they institutionalize. The State officials know the condition of their institutions. Many will say they do not need the Federal Government sticking its nose into what is a State's business. This legislation takes that into account and requires that no action can be commenced until at least 30 days after the appropriate State, local and institutional officials have been notified and that the State has had a reasonable time to develop a plan to correct such deprivations and have not done so. Also, the Department of Jnstice mnst consult with the State regarding assistance which may be available from the United States.

Over the last several years, the Department of Jnstice has been involved in approximately 40 cases seeking to protect the rights of the institutionalized. In October 1977, the U.S. Court of Appeals for the Fonrth Circuit affirmed the district court's ruling and held that "without specific statutory authorization" the United States may not sue to protect the rights of the institutionalized mentally retarded (*U.S.* v. *Solomon*, 419 F. Supp. 358; affirmed 563 F.2d 1121, 4th Circuit, 1977). Without this legislation, the Department of Justice's modest activity in this area will have to cease.

It is unlikely that H.R. 10 will appreciably increase the Department of Justice's budget or resnlt in many new positions. In fact, given clear statutory authority, the Justice Department may need less litigation support since time can be spent on the merits rather than the procedural issue of standing. The only immediate increase that may be projected as a result of H.R. 10 wonld be for three additional personnel—two attorneys, and one clerk—to fulfill the requirements of section 5 of the bill which requires the Attorney General to develop and promulgate standards for grievance mechanisms and to certify those which are snbmitted hy State institutions. For that, the cost estimated hy the Congressional Budget Office is $81,000 for fiscal year 1980.

Mr. Chairman, H.R. 10 represents a modest, good faith effort to try and improve conditions in our institutions throughout the country. A Washington Post editorial on Febrnary 24, 1979, noted that while nnderstandable that our Government has difficnlty protecting U.S. citizens in remote corners of the world, it can do a better job protecting rights of those citizens at home, even within State institutions. I concur, and I nrge Members to vote favorahly for passage of H.R. 10 as reported.

Mr. KASTENMEIER. Mr. Chairman. I now yield 5 minutes to the distinguished gentleman from Missouri (Mr. Volkmer), a member of the Committee on the Judiciary.

Mr. VOLKMER. Mr. Chairman, I wish to commend the gentleman from Wisconsin (Mr. Kastenmeier) and the gentleman from Illinois (Mr. Railsback), as well

as the subcommittee, for the work they have done on this historic piece of legislation.

I would like to engage the gentleman from Wisconsin (Mr. Kastenmeier) and also the gentleman from Virginia (Mr. Butler) in a colloquy regarding a certain provision of section 4, referring to the latter part of the first paragraph, which contains language providing that the standards for grievance procedures "shall take effect 30 legislative days after final publication unless, within such period, either House of the Congress adopts a resolution of disapproval."

My only question in regard to this is as to the procedure that would be followed in the event a resolution of disapproval had been introduced by a Member.

Since the procedure is not set out in the legislation itself and since there is a time limit of 30 days in which action must be taken or else standards go into effect, I would like to have the comments of the chairman of the subcommittee and also the gentleman from Virginia (Mr. Butler) as to exactly how this will work.

Mr. KASTENMEIER. Mr. Chairman, will the gentleman yield on that point?

Mr. VOLKMER. I gladly yield to the gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I am pleased to respond to the gentleman from Missouri (Mr. Volkmer).

As the gentleman knows, the House did modify language on this point to reflect what is presently in the bill, and the gentleman from Virginia (Mr. Butler) was, I believe, the moving party on that question.

I can understand that there may be some apprehension as to how the one-body legislative veto will work in this connection. I would assert that at that time, at a timely moment, my subcommittee will entertain hearings on this question. The gentleman from Missouri (Mr. Volkmer) and indeed any Member, as well as all appropriate persons who care to be heard on the matter, will be most welcome.

We have already discussed this with the Assistant Attorney General for Civil Rights of the Department of Justice. He has been cooperative with respect to keeping us fully informed so that the legislative veto provision can be implemented in timely fashion. If the House may care to do so, it may in fact veto those provisions. It is not our purpose obviously to frustrate the will of the House in that connection.

Mr. Chairman, I do hope the gentleman from Missouri (Mr. Volkmer) will support the existing language rather than provide for other language with respect to discharge petitions and the like.

Mr. VOLKMER. Mr. Chairman, I had contemplated introducing an amendment to set out specifically in the language the procedures to be followed. However, I do appreciate receiving these assurances of the gentleman from Wisconsin (Mr. Kastenmeier), and I will yield later to the gentleman from Virgina (Mr. Butler).

With those assurances, that not just I, but any Member of this House who feels for valid reasons that the standards would not be workable may introduce a resolution disapproving the standards, and with the assurance from the chairman that hearings will be held and will permit the committee and this House to act on the resolution. I will not offer my amendment. I now yield to the gentleman from Virginia, but befeore I do, I wish to commend him for having this language put in the bill. I feel it is one of the safeguards, since we are doing something for the first time to set up standards, permitting the Attorney General to set up standards, for grievance procedures. I think this provision is a very necessary ingredient. It can give the Congress at least an opportunity to look at these before they go into effect.

I would like to ask the gentleman from Virginia if he feels confident that these procedures can be followed within the 30-day time.

Mr. BUTLER. If the gentleman will yield, I give the gentleman every assurance that I can that this 30 days was not selected that lightly. I have had an opportuuity to review the amendment the gentleman is contemplating. I think the objective the gentleman has in mind there is accomplished by the language in the legislation. I think, to emphasize again, if I may, the voluntary nature of the standards, that they are not imposed upon the States, but they are an option to them if they comply.

I think the one-House veto, the 30-day period of time, and the knowledge that we have the time of publication in the Federal Register, we can accomplish the objective of the gentleman.

Mr. VOLKMER. I thank the gentleman.

Mr. RAILSBACK. Mr. Cbairman, I yield 2 minutes to the gentleman from Michigan (Mr. Sawyer).

(Mr. Sawyer asked and was given permission to revise and extend his remarks.)

Mr. SAWYER. Mr. Chairman, I am on the snbcommittee and I am familiar with this biii. I initially approached this legislation witb some reservation.

I am now totally satisfied with the biii. I think it is an excellent piece of iegislation. It does not infringe npon or abuse the rigbts of State authorities with respect to institntionalized persons in either the State prisons or other institutions.

The Attorney General must, before he can do anything, give specific notice to the Governor of the State and tbe attorney general of the State, specifying in detail what he finds wrong and that it amounts to an actual pattern and practice as opposed to an isolated abuse. He must give the Governor or the attorney general a minimum of 30 days within which to take action to correct this situation—and longer, if tbat is not reasonably sufficient time. Upon the commencement of proceedings to compel compliance or enforcement by the State, he must certify to the Federal district court, that he has given at least 30 days notice to the Governor and the attorney general, tbat he has specified with particularly the pattern and practice complained of, giving the facts to support it, and he must also certify that there has been a reasonable amount of time for compliance or correction by tbe Governor or the attorney general. So that it is really longer than 30 days, if longer than 30 days would be required to correct the problem.

Aiso, witb respect to grievance procedures being specified by the Attorney General, the guidelines are laid out in the biii. They are very good guidelines, in my opinion. They involve for inmate participation and a final appeai to an outside authority disconnected from the institution. They require answers in writing to the grievances, and I am sure it will go a long way to diminish section 1983 lawsuits, under which penalty State prisoners can go directly into Federal court with an action.

This biii does not permit the Attorney General to impose these grievance procedures on a State prison. The States have the option. If the State opts to substantially adopt these grievance procedures, then before a prisoner may go into Federal court with a 1983 suit, he must go back and go through the grievance procedures to see if it cannot resoive the grievance without unnecessarily taking up the court's time and the State attorney general's time.

Mr. BURGENER. Mr. Chairman, will the gentieman yield?

Mr. SAWYER. I yield to the gentleman from California.

(Mr. Burgener asked and was given permission to revise and extend his remarks.)

Mr. BUROENER. Mr. Chairman, I rise in support of H.R. 10, a biii which would allow the U.S. Attorney General to intervene on behalf of institutionaiized persons wbose rights are being violated. The passage of this biii is critically important to the almost 200,000 mentaiiy retarded citizens who currently reside in institntions throughont the country. Despite numerous exposés by the press and advocacy organizations such as the President's Committee on Mentai Retardation and the National Association for Retarded Citizens, evidence continnes to mount indicating continued and systematic gross violations of basic hnman rights in our Nation's institutions serving mentaiiy retarded people.

I cannot think of a more vulnerabie segment of onr society than severeiy and profoundly retarded persons, most of them far away from their families, living under dehumanizing, sometimes borrible, conditions. At the present time, the Federal Government, particularly tbe U.S. Justice Department, cannot intervene on their behalf, even tbougb the Constitutional rights of these persons are clearly being violated. Surely, these most vuinerabie individuals deserve the fuliest protection under the law.

I would also like to add that tbe passage of this biii will have practically no effect on the Federal budget. The protection afforded by H.R. 10 would be implemented by an existing entity witbin the Justice Department, thereby necessitating few, if any, additional Federal expenditures. I strongiy urge my colieagues to support tbis biii.

Mr. SAWYER. Mr. Chairman, I urge support for the biii.

Mr. KASTENMEIER. Mr. Chairman, I yield 4 minutes to the distingnished gentleman from Nortb Carolina (Mr. Gudger).

Mr. GUDOER. Mr. Chairman, I thank the gentleman for yielding, and I wish to commend the gentleman, the ranking minority member, and each member of

the Subcommittee on Courts who has participated in the drafting of this very important legislation.

Mr. Chairman, I produced yesterday and distributed to many of the Members of this body a letter in which I compare H.R. 10, the bill under debate here in the 96th Congress, with H.R. 9400, the comparable hill in the 95th Congress, and I drew these distinctions between these two pieces of legislation which I feit most significant and pointed out what I thought was a vast improvement in H.R. 10 over H.R. 9400. I am impressed by the fact that the gentieman from Michigan (Mr. Sawyer), in his remarks, has drawn out some of those distinctions without making reference to the prior legislation. I would state that I think H.R. 10 is particularly significant, in that no longer is it proposed that there be any change in the discretionary intervention rule, and the attorney general may intervene only as presently authorized by rules 24 (a) and (b) of the Federal Rules of Civil Procedure.

I point out, also, the H.R. 10 is distinguishable from H.R. 9400 hy another major revision, in that the attorney general may not institute litigation against a private institution, only one which is acting for the State or as is agent.

I would also point out that H.R. 10 has many other safeguards, some of which have been commented upon hy the gentieman from Michigan (Mr. Sawyer) in his observations, and some of which I would like to repeat, including some of the following: Under the legislation, H.R. 10, the attorney general is permitted to take action only if he believes that there are conditions in an institution which cause grievous harm to the persons confined or residing there which deprive them of rights, privileges, or immunities secured or protected hy the Constitution or laws of the United States and that a State or its agent is subjecting these persons to such conditions pursuant to a "pattern of practice." Thus the facts supporting such action could not be an isolated incident or compiaint.

In order to protect the baiance of Federal-State reiations, the biil has set procedures which must he followed before the attorney general may initiate a civil suit: First, he must believe that the action is of "general public importance" and will materially further the vindication of rights secured or protected by the Constitution.

Second, he must give proper, detailed notification to the appropriate officials including the chief executive and legal officers of the political unit involved—for example, a Governor and attorney general, as well as the institutional officials, would have to be given such notification prior to any suit against a State. The notice must contain, in addition to the alleged pattern or practice of deprivations, the facts upon which this conclusion is based, including the dates or time period during which the alleged deprivations took piace and, when feasible, the identity of all persons reasonably suspected of being involved in causing such deprivations. To the extent his information permits, the attorney general must state the measures which he believes may remedy the alleged pattern or practice of deprivations. Such measures of relief would be equitable, for example, injunctive relief to correct existing conditions. No money damages would be sought hy the United States.

Third, before the attorney general can initiate such a civil action, he must make a reasonable effort to consult with the appropriate public and institution officials regarding assistance which may be available from the United States and which he believes may assist in the correction of such conditions. Assistance may be technical, financial, or other forms of assistance.

Fourth, hefore the attorney general may initiate a suit he must be satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such deprivations and have not adequately done so.

All of the above presuit conditions must be certified to the court as having heen met hy the attorney general at the time he files his suit. All such complaints must be personally signed hy the attorney general.

As you can see, the committee has carefully structured the hill to safeguard the rights of State and public entities. I believe that the attorney general will exercise such power cautiously. Its effect will be to improve the quality of life for institutionalized persons, and to insure that this uniquely vulnerable group are insured the full protection of the Constitution and laws of the United States.

I hope you will give this bill your full support.

These deprivations must be a part of a pattern or practice. Let me also mention that this committee report is singularly sophisticated, filled as it is, with numerous subnotes, and with clear definition of the legal derivation of language

used in the bill, snch as the term, "pattern or practice," so that we may know that it is not intended to relate to an isolated case by reference to the very judicial decision from which that very language was lifted.

So we have here a committee report which represents outstanding staff work. We have here a bill which represents a great deal of committee effort and thought, and I believe a piece of legislation which deserves our uniform support. I urge my colleagues to join me in voting for this legislation.

Mr. RAILSBACK. Mr. Chairman, I yield 3 minutes to the gentleman from Ohio (Mr. Kindness).

Mr. Kindness asked and was given permission to revise and extend his remarks.)

Mr. KINDNESS. Thank you, Mr. Chairman.

I rise to sound a warning, and sometimes it seems that it is almost impossible to sound a warning when no one is listening.

Here we are, a few of ns, from the Judiciary Committee, again gathered together to praise each other about the work that has been done over the years on this legislation and tell how different it is from last year when it was not worth mnch to most of us.

How different it is indeed. It is the same bill, practically speaking, with some minor revisions.

Mr. Chairman, there has to be some warning sounded that this is essentially the same thing as H.R. 9400 of the last Congress.

Ultimately, it gives the Justice Department a big stick to wield over the States while offering no help to the States to overcome the problems that are complained abont, problems that are shared by Federal institutions as well as State institutions.

This bill does not do anything to solve the problems. It only puts the Justice Department in an adversary position with State and local governments.

How constructive is that approach when we might be doing something far more constructive to assure that the constitutional rights and privileges of people in institntions are dealt with properly.

The bill would authorize the Attorney General to initiate actions against the States where there is a pattern or practice of deprivation of rights of persons in institutions that are covered by the bill, and the Attorney General already has the authority to intervene in those cases.

It is apparently not enough to have just the authority to intervene or to work ont these situations throngh conciliation or other means. We have got to have those eager litigators down at the Justice Department going into court against State and local governments.

If it is really so harmless, vis-a-vis, the States, then why is the National Association of Attorneys General still adamantly opposed to this legislation?

The Members have all received a letter from the chairman of the Judiciary Committee, written by the Attorney General, which says that H.R. 10 would not in any way grant the Attorney General the power to mandate any actions by State or local government entities.

As the President said the other day, in response to a similarly absurd suggestion, that it is a lot of baloney.

Before the Attorney General can use this new authority to sue, he must notify the appropriate State officials of the measures which he believes may remedy an alleged pattern or practice of deprivation, and if the States do not react within an appropriate period of time, as determined by the Attorney General, of course, then he can go into conrt.

The legislation sets np the Attorney General as a kind of Federal overseer of State institutions. There is no question about that.

The CHAIRMAN. The time of the gentleman from Ohio (Mr. Kindness) has expired.

Mr. RAILSBACK. Mr. Chairman, I yield 3 minntes to the gentleman from Illinois (Mr. Hyde).

(Mr. Hyde asked and was given permission to revise and extend his remarks.)

Mr. HYDE. Mr. Chairman, I have been listening with great interest to my good friend and esteemed colleague from Ohio, but I am at a loss to determine why the Federal Government should pay a State to respect someone's constitutional rights.

Sure, the National Association of Attorneys General does not want anyone looking over its members shonlders. This is the same group that has been bnsy

filing the glamorous environmental snits and the consumer protection snits, but people abused in institutions, somehow there is not time to get aronnd to them.

I am talking about 1 million people, retarded, chronically ill, senile, disabled, who inhabit jails and nursing homes and juvenile facilities. This bill reaches ont to them and provides them with one more voice, maybe, to speak up under certain severely controiled circumstances on their behalf.

Tbese institutions and facilities have to be owned or operated or managed or provide services on behalf of a State or political snbdivision, not private faciiities.

You have heard of the silent majority. Yon have heard of the noisy minority. But there exists a silent minority, a silent minority of people who have no weli-paid lobbyists prowling the Halls of Congress speaking on their behalf. They are just people, human belngs who suffer witbout any advocacy or withont any hope.

Nobody resists Federai intervention with more vigor than I do, but when you have a disaster, you reach out to get help anywhere you can.

I submit to my colieagues, In the real world, some of these mental institutions and some of tbese prisons are nothing iess tban a disaster.

Oh, how we conservatives admonish our liberal friends to come to grips with the real world.

I suggest the reai world is a lot of mental homes and jails and jnvenile facilities and nursing homes that are more appropriate for a Dickens novel than for a 20th-century modern community.

In this legisiation there are significant safeguards to protect against abuse; a pattern or practice must exist, not an isoiated instance.

There has to be notification to tbe State anthorities, consultation, time to correct the situation must be provided and the suit must be of general public importance. The bill does not impose any new obligations on tSate or local government, does not create any new rights or does not impair any existing rights, but it provides standing for the Attorney General to enforce constitutional rigbts under severely controlled circumstances in civii litigation.

In Illinois, the gangs controi the prisons. Do not teli me that we are going to clean that situation up soon. It has gone on for too many years in this country and everywhere in the world. I do not intend to continne to wave the flag of no Federal intervention for another 200 years, while the inhumane conditions this legislation seeks to alleviate go on and on. I fully support this bill.

The CHAIRMAN. The time of the gentleman from Illinois (Mr. Hyde) has expired.

Mr. RAILSBACK. Mr. Chairman, I yield my remaining time to the gentleman from California (Mr. Lungren).

The CHAIRMAN. The gentleman from California (Mr. Lungren) is recognized for 1 minute.

(Mr. Lungren asked and was given permission to revise and extend his remark.)

Mr. LUNGREN. Mr. Chairman, I thank the gentleman for yieiding.

In taking tbis time, I would really like to echo the words of my distinguished colleague from Illinois (Mr. Hyde), that this is not a conservative versus liberai question. This is not a question of the Federal Government overstepping its bounds. It is simply a question of ns enforcing the constitutional rigbts of those people who most severely need some protection and who sorely need some recognition from the House and from government at all levels.

It seems to me that the question of States rights does not apply here. These are rights the individuais already bave. All we are attempting to do is to facilitate the means by which they might bring this qnestion to the forefront. There is no doubt in my mind that one group is probably the one that really has no advocacy here. That is the prisoners of America. I think other people who know me know that I am as hard a liner on crime as anybody, and I support mandatory prison sentences, but when we have a situation in this country when some of our prisons, Federal as well as State, are a national disgrace, and where some judges will not exercise what they feel to be their right to send people to prison because of the deplorable circumstances in which those people are surrendered, there is something that should be done.

I would urge support of this bill.

Mr. PEPPER. Mr. Chairman, I am pleased to be recorded in support of H.R. 10. This legislation will give the Attorney General of the United States the authority to initiate or intervene in civil actions in order to redress patterns of depriva-

tion of civil rights of institutionalized persons, including institutionalized children, prisoners, persons being cared for in our mental health institutions, and our institutionalized elderly. Furthermore, this legislation clarifies the standing of the United States when there is no underlying Federal statute specifically authorizing intervention by the Attorney General, while not changing existing law governing the conduct of institutions covered by the bill. I commend by distinguished colleague from Wisconsin (Mr. Kastenmeier) and members of his committee, for their efforts in bringing this measnre to the floor. It is an important bill and one which should be heralded as a major step toward protecting the basic rights of institntionalized persons.

My concern regarding the need for this important legislation derives in part from my experience as the former chairman of the House Select Committee on Crime. After the disaster in Attica, the select committee held extensive hearings on prison conditions—hearings which went far in substantiating the fact that our prison system had failed. We found conditions of confinement in adult prisons and in juvenile detention centers so deplorable that some of the most vocal critics of the prison system were the prison administrators themselves.

On the other hand, in my capacity as chairman of the House Select Committee on Aging, I have found on numerous occasions that inhuman conditions encountered by residents of nursing homes and other State-operated institutions across the country were, if possible, worse than those in onr correctional institutions. Onr committee has documented numerous instances in which the rights of patients are infringed, where persons are involuntarily committed or released from institutions without provisions for care, or where such persons live in fear that complaints abont inadequate care or attempts to seek better care would inevitably lead to further hardship. Unfortunately, these circnmstances have been allowed to persist in many cases because of lack of authority, direction, or will to redress the grievances. This legislation is a strong step toward meeting these problems.

It is fortunate that the National Conference on Mental Health and the Eiderly, sponsored by the Select Committee on Aging, had the opportunity to consider H.R. 10 jnst weeks in advance of the floor debate today. Over 300 delegates from nearly all 50 States, representing major national organizations concerned with mental health and the elderly, met in the House of Representatives to draft and consider legisiative measures to address the nnmet needs of our eiderly with mental problems. To protect the rights of those confined in mental institutions, the delegates to the national conference endorsed unanimously H.R. 10 and urged that the protections embodied in this legislation be extended to those in nnrsing homes.

As I mentioned earlies, the bill as I understand it gives the Attorney General of the United States clear anthority to institute a civil action to attack those situations where a pattern of deprivation of civil rights can be estabiished as occurring in the presence of significant State action. Whiie I believe the Constitution already affords these protections, certain recent court decisions have necessitated this clarification. If the civil rights of individuais are heing abnsed in the presence of State action then the Federal Government has not only a legal responsibiiity but a moral obligation to intercede.

I am certain many of my colieagues recognize that the concept of State action is one that is constantly evolving. For this reason, I would like to comment on what I believe to be the intent of H.R. 10. There are two scenarios that would seem covered by this legislation. I think that it is important for the Record to specify what these are.

Scenario No. 1. On numerous occasions the committee has documented situations where a patient-inmate of a public mental health facility no longer needs to receive treatment as an inpatient. An employee of the institution informs him of this fact and recommends or otherwise acts so that the individual moves to an alternate, less restrictive facility in the community. Later, it is determined that it is possible to establish a pattern of abuse in this alternate faciiity of the constitntionai rights of its residents.

Both conditions of the law have been satisfied. The "State action" principle has been met by virtue of the specific placement act of the employee, and the principle of "pattern of abuse" in the facility has been established through appropriate inquiry. In this instance, the Attorney General should have the authority to intercede on behalf of the aggrieved residents living in that faciiity as a consequence of State action. We have found significant evidence of this scenario being repeated all over the country. States have, in many instances,

acted irresponsibly. They have dumped from their State hospitals thousands of former mental patients and placed them in essentially unregulated community residences where their rights have been seriously abused. This bill should hold the States and others involved accountable for these acts.

The second scenario also satisfies the two principle criterion of H.R. 10. In this situation, one that we have observed in Illinois and other States, the person or persons involved either live at home or are patients in a facility, which may be privately owned. For a variety of reasons, the State or local unit of government acts to move that individual to another specific location. Frequently, for example, the State welfare office will make arrangements to relocate an individual from a general hospital to a long term care facility. Later, sufficient evidence is accumulated to demonstrate that a pattern of abuse is taking place in this facility. In this instance, the State has acted by placing the individual into this facility where a pattern of abuse is alleged. Once again, I would hope that the Attorney General would have the specific power to intervene in this situation. The State or local unit of government should be held accountable for their acts and the rights of this often disenfranchised group should be protected.

Mr. Chairman, I urge the immediate passage of this important measure.

Mr. KASTENMEIER. Mr. Chairman, I have no further requests for time, and I yield back the balance of my time.

The CHAIRMAN. Pursuant to the rule, the Clerk will now read the committee amendment in the nature of a substitute recommended by the Committee on the Judiciary now printed in the reported bill as an original bill for the purpose of amendment.

The Clerk read as follows:

That as used in this Act—

(1) the term "institution" means any facility or institution—

(A) which is owned, operated, or managed by or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles held awaiting trial or residing for purposes of receiving care or treatment or for any other State purpose; or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;

(2) the term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(3) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States; and

(4) the term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 2. Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, any official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State, is subjecting persons residing in or confined to any institution to conditions which cause them to suffer grievous harm and deprive them of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available to persons residing in an institution as defined in paragraph (1) (B) (ii) of the first section of this Act only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States. The Attorney General shall sign the complaint in such action.

SEC. 3. (a) At the time of the commencement of an action under section 2 of this Act, the Attorney General shall certify to the court—

(1) that, at least thirty days previously, he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of

tbe appropriate State or political subdivision of the State and the director of the institntion of—

(A) tbe alleged pattern or practice of deprivations of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;

(B) the supporting facts giving rise to the alleged pattern or practice of deprivations, including tbe dates or time period during whicb the alleged pattern or practice of deprivations occurred and, wben feasible, the identity of all persons reasonably suspected of being involved in causing tbe alleged pattern or practice of deprivations; and

(C) tbe measures wbicb be believes may remedy tbe alleged pattern or practice of deprivations;

(2) tbat be or bis designee has made a reasonable effort to consult with the Governor or cbief executive officer and attorney general or chief legal officer of tbe appropriate State or political subdivision and tbe director of tbe institution, or tbeir designees, regarding assistance which may be available from tbe United States and whicb he believes may assist in tbe correction of such pattern or practice of deprivations;

(3) that he is satisfied that tbe appropriate officials bave bad a reasonable time to take appropriate action to correct such deprivations and have not adequately done so; and

(4) that be believes tbat sucb an action by the United States is of general public importance and will materially further the vindication of tbe rights, privileges, or immunities secured or protected by tbe Constitution or laws of tbe United States.

(b) Any certification made by the Attorney General pursuant to tbis section sball be signed by bim.

SEC. 4. (a) No later than one hundred and eighty days after the date of enactment of this Act, the Attorney General sball, after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections, promulgate minimum standards relating to the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adult persons confined in any jail, prison, or otber correctional facility, or pretrial detention facility. The Attorney General shall submit sncb proposed standards for publication in tbe Federal Register in conformity with secton 553 of title 5, United States Code. Such standards shall take effect tbirty legislative days after final publication unless, within such period, eitber House of tbe Congress adopts a resolution of disapproval. The minimum standards shall provide—

(1) for an advisory role for employees and inmates of correctional institutions (at tbe most decentralized level as is reasonably possible) in tbe formulation, implementation, and operation of the system;

(2) specific maximum time limits for written replies to grievances with reasons thereto at each decision level witbin the system;

(3) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or otber damages;

(4) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance;

(5) for independent review of the disposition of grievances, including alleged reprisals, by a person or otber entity not under tbe direct supervision or direct control of the institntion.

(b) The Attorney General sball develop a procedure for the prompt review and certification of systems for the resolution of grievances of adult persons confined in any jail, prison, or other correctional facility, or pretrial detention facility, wbich may be submitted by the various States and political subdivisions in order to determine if such systems are in substantial compliance with the minimum standards promulgated pursuant to tbis section. The Attorney General may suspend or withdraw such certification at any time if be has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated pursuant to this section.

(c) In any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult person convicted of a crime confined in any jail, prison, or other correctional facility, the court sball continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in tbe interest of justice, except tbat such exbaustion sball not be required unless tbe Attorney

General has certified or the court has determined that such administrative remedy is in substantial compliance with the minimum acceptable standards promulgated pursuant to this section.

SEC. 5. The Attorney General shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act;

(2) a detailed explanation of the process by which the Department of Justice has received, reviewed, and evaluated any petitions or complaints regarding conditions in prisons, jails, or other correctional facilities, and an assessment of any special problems or costs of such process, and, if appropriate, recommendation for statutory changes necessary to improve such process; and

(3) a statement of the nature and effect of the standards promulgated pursuant to section 4 of this Act, including an assessment of the impact which such standards have had on the workload of the United States courts and the quality of grievance resolution within jails, prisons, and other correctional or pretrial detention facilities.

Mr. KASTENMEIER (during the reading). Mr. Chairman, I ask unanimous consent that the committee amendment in the nature of a substitute be considered as read, printed in the Record, and open to amendment at any point.

The CHAIRMAN. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

AMENDMENT OFFERED BY MR. KASTENMEIER

Mr. KASTENMEIER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Kastenmeier: On page 15, after line 19 add the following new section:

SEC. 6. This act shall take effect on October 1, 1979.

Mr. KASTENMEIER. Mr. Chairman, I will take less than a minute.

This amendment is purely technical. It is offered to bring the act into clear compliance with the Budget Act. The effect of the amendment will be to make H.R. 10 effective at the beginning of fiscal year 1980.

Mr. Chairman, I know of no opposition to this. This is agreed upon by the Rules Committee. I ask for its adoption.

Mr. BUTLER. Mr. Chairman, will the gentleman yield?

Mr. KASTENMEIER. I yield to the gentleman from Virginia.

Mr. BUTLER. Mr. Chairman, this, of course, establishes an effective date of the act. We have also a provision in section 4 that no later than 180 days after the date of enactment of this act, the Attorney General shall promulgate the standards.

I judge that the effective date of the act does not alter that 180-day standard in the act.

Mr. KASTENMEIER. No; it does not.

Mr. BUTLER. I thank the gentleman.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Wisconsin (Mr. Kastenmeier).

The amendment was agreed to.

AMENDMENT OFFERED BY MR. KINDNESS

Mr. KINDNESS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Kindness: On page 9, line 4 strike "or provides services on behalf of".

Mr. KINDNESS. Mr. Chairman, I offer this amendment on page 9 at line 4 for the purpose of further clarifying what was attempted to be clarified in the change from H.R. 9400 of the last Congress to H.R. 10 in this, the 96th Congress. The problem is that it has not been very clear that where a State or local government contracts with some private party for the operation of an institution, that that institution or those services will or will not be covered, but particularly where there might be medicare or medicaid patients in a private institution the question is still a little cloudy as to whether we are intending to cover such private nursing homes, for example, or hospitals.

The language that would be stricken by this amendment is the words, "or provides services on behalf of". That would leave subsection (A) on page 9, starting on line 3, with reference to an institution and defining it, "an institution which is owned, operated, or managed by any State or political subdivision of a State * * *"

It would no longer read, if this amendment were adopted, an institution "* * * which is owned, operated, or managed by or provides services on behalf of any State or political subdivision of a State * * *"

I think it is necessary to make it clear that we are not trying to cover private institutions that incidentally provide services for or on behalf of a State. I think the language of the bill would be greatly clarified by striking these words, making it clear that we only intend to cover those institutions that are owned, operated, or directly managed by State or local governments. The arguments that have been made in the committee concerning this language are very unclear to me. I remain unconvinced that there is a serious intention on the part of the authors of the bill to really clarify this point, because they insist on keeping this language in that says, "or provide services on behalf of * * *"

That means welfare patients, medicare and medical patients, in private nursing homes are indeed going to be covered by this bill. No matter how obtuse or acute the arguments presented, it still comes out the same way.

I do not see why we insist upon excluding items containing language such as I seek to strike by this amendment. I would urge the adoption of the amendment. Those who really want the bill to pass and serve a purpose ought to be willing to support such an amendment as that, at least.

Mr. RAILSBACK. Mr. Chairman, I rise in opposition of the amendment.

Mr. Chairman, the subcommittee and the committee spent a great deal of time discussing this particular amendment. We struck the term, "or pursnant to a contract * * *" in our mark-up, which had followed the words, "on behalf of * * *" but did not want to exclude an institution which provides services on behalf of any State or political snbdivision of a State.

Now, here is why we want that language left in: Supposing a State closes down a State institution such as a nursing home or an orphanage or some other facility, and places the residents in other facilities, pays for the residents, make referrals to those facilities and acts as a partner with the facility. It can be said that the institution is acting on behalf of the State. Now, we do not want to immunize any person of facility from liability for actions which are on behalf of the State or similarly covered under the nexus of civil rights laws. We think it would be a big mistake to knock out that language, and we may unintentionally be really harming our bill. So, I rise in strong opposition to the amendment.

Mr. GUDGER. Mr. Chairman, I move to strike the last word, and I rise in opposition to the amendment offered by the gentleman from Ohio.

The gentleman would limit the term "institution" to only those facilities which are owned, operated, or managed by a State or political subdivision of a State, and which are for the purposes listed in subparagraph (B) of the first section.

First, I would like to note that the term "institution" as already defined in H.R. 10 is narrower than the same term defined during the 95th Congress in H.R. 9400. An amendment proposed by me was adopted by the snbcommittee to delete the words, "or pursuant to a contract with * * *.

Now, that amendment clarifies that a private facility which has a contract with the State, for example, to render medicare or medicaid services, could not, based solely on that contract, be brought within the scope of H.R. 10. In general, H.R. 10 does not cover private facilities. Certainly purely private conduct, no matter how wrongful, is not subject to suit under this legislation. H.R. 10 could cover a private facility only if that facility were providing services on behalf of a State or political subdivision, a situation which could exist under the circumstances mentioned by the gentleman from Illinois (Mr. Railsback) when he suggested that a State could close down a facility and assign to a private institution by contract or otherwise the function of rendering that particular traditional State service. Such a facility under H.R. 10 would have a public nexus, and it should not be immune from suit under this legislation.

I am afraid that the amendment offered by the gentleman from Ohio would exempt a private institution which is acting for the benefit of the State and at the request of the State and rendering a service traditionally rendered by the State from having that public nexus. He would exclude that institution from accountability. I think this does damage to the essential purpose of this legislation, narrows it too much and defeats its ultimate purpose of making sure those

services which a State has traditionally rendered to its citizens should be accountable by the State and by those who operate for the State or on behalf of the State or in the place of the State.

Mr. KINDNESS. Mr. Chairman, will the gentleman yield?

Mr. GUDGER. I will be happy to yield.

Mr. KINDNESS. Is the gentleman indicating that it is his thinking and intention that the private institution that incidentally cares for medicare or medicaid patients would not indeed be covered by this language?

Mr. GUDGER. Certainly it was my intent when I offered the amendment in the subcommittee deleting the words, "* * * by contract with * * *" that that be the effect of this legislation. That is that private institutions which are taking the place of the State in rendering traditional State services, such as to the mental patient, to the prison inmate, to the handicapped or seriously retarded child, that these would be the classes that would be subject to litigation by the Attorney General. Certainly persons are exempt who are receiving private services under contract of their own negotiation with a private institution which is rendering some form of nursing or rest home care.

We discussed in subcommittee, as the gentleman will recall, that there are about 125,000 different rest homes and nursing homes in the United States, and that it was certainly not the sense of the subcommittee that all of these, just because they provided some medicare- or medicaid-funded service, would be subject to litigation under this act.

Mr. KINDNESS. I thank the gentleman for that assurance of his intention, and if I felt it was really shared by the other proponents of the bill, I would feel a lot more comfortable about it, and the need for this amendment would perhaps be erased. However, the adherence to the desire to maintain this language in the bill has caused me to feel quite uncomfortable about what the intention really is.

Mr. GUDGER. I certainly honor the gentleman's bona fides, and I know that he has been a very, very important member of the committee and has addressed very important concerns to the subcommittee and to the full committee concerning this and many other matters.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Ohio (Mr. Kindness).

The amendment was rejected.

AMENDMENT OFFERED BY MR. KINDNESS

Mr. KINDNESS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Kindness: On page 9, strike the language beginning on line 10 through to the semicolon on line 11.

On page 9, line 16, strike "(v)" and insert "(ii)".

Mr. KINDNESS. Mr. Chairman, I would draw to the attention of those who may have seen this amendment at an earlier stage when it was published in the Record, at which time it referred to striking more language down to the semicolon on line 15, that this amendment is slightly different from that which was in the Record earlier. This amendment would strike only the language contained in lines 10 and 11 that read: "a jail, prison, or other correctional facility;".

The purpose of the amendment is to remove from the term "institution" or the definition of the term "institution" a jail, prison, or other correctional facility. The Members may recall—certainly everyone who is here recalls, because everyone is on the Committee on the Judiciary I guess—there was quite a hassle on the floor last year about removing jails and prisons from the coverage of this bill. The gentleman from Pennsylvania (Mr. Ertel) was the author of an amendment which was successful at one stage in removing jails and prisons from the coverage of the bill. The problem with this measure in the main is that we are attempting to do something that we do not have the guts to do directly, that is, to amend the Civil Rights Act for some people—for prisoners. We are providing in this measure for a grievance-procedure clearance program to be set up so that the Attorney General would give the Good Housekeeping Seal of Approval to grievance procedures adopted by State and local governments for their jails and prisons. This gives the Attorney General the "lead in" for controlling our jails and prisons through that approval procedure. Mark my work, we will see it happen if this bill passes that within a few years we will not be able to get any LEAA funds in our jurisdictions, that is, State or local, if there is a prison that does not have an approved grievance procedure that comes about under the

terms of this bill. All of these things start this way. They start a little bit small, and those people down at the Department of Justice or in some other department or agency who are being paid to do something have to find something to do with their time, and they dream up things that we find it very difficult to live with in State and local government.

We also have physical facility standards that are causing quite a bit of difficulty in some of the States. Do we have to wait until the jails and prisons are closed down by Federal fiat before we recognize that we are creating a problem? Why not be cautious about this and leave jails and prisons out of this?

The high-sounding talk here, in the main, is directed at people in institutions for the mentally retarded, for mental illness, and the like, and there is where we are saying we must help these people. That is not where most of the action is going to be under this bill. Most of the action is going to be with respect to jails and prisons and correctional facilities. We do not have any business telling the States and local governments that they have got a problem, and highlight it by a lawsuit, when we have the kinds of problems that we have existing in Federal institutions.

For that matter, look at Saint Elizabeth's Hospital that comes under the Department of HEW. That is not a District of Columbia agency; that is a HEW agency. What are we doing there? Passing this bill to help things down at Saint Elizabeth's? No; it does not work that way. The Department of Justice would have to defend a claim against Saint Elizabeth's if there was a problem there of depriving people of their constitutional rights, and, indeed, there is such a problem.

Let us be reasonable about this and at least not put in jails and prisons under the coverage of institutions in this bill. That is what the bill really is all about, of course. We are trying to cut down on section 1983 cases under the Civil Rights Act, and it will not work. This bill will not do it. So why do we not pass a bill, if it is going to be passed, that at least restricts itself to what the people are saying it is supposed to be doing; help people in institutions for the mentally ill and mentally retarded, and leave jails and prisons out of it?

Mr. KASTENMEIER. Mr. Chairman, I rise in opposition to the amendment. The degree of civilization in a society can be judged by entering its prisons, Dostoievsky said a long time ago. As the gentleman from California (Mr. Lungren) and others have suggested, it might be easy to remove prisons from coverage under this bill. We have already limited the coverage, but I plead with my colleagues not to respond to this amendment by removing prisons. We are talking about a pattern or practice of abuse of constitutional rights, not statutory rights but constitutional rights only for prisoners.

The gentleman from Ohio (Mr. Kindness) himself said, "Do we want to wait for the prisons to be shut down before we recognize we have a problem?" I hope the answer is no, and I hope that we will keep prisons in the ambit of this legislation. We, in fact, went through this last year. We debated this fully last year. The House expressed its will. This will is again expressed in this bill as presently constituted. We limit the Attorney General's authority to initiate actions under this legislation covering a jail, prison, or other correctional facility to cases involving conditions which violate constitutional rights, privileges, or immunities, for example, the eighth amendment prohibition of cruel and unusual punishment. For the bill to have any credibility at all, I plead with my colleagues to reject this amendment because prisoners, even though they may not be the most popular of those who are discriminated against in our institutions, are also entitled to be protected against dehumanization and brutality. We would have failed if we were to agree to this Kindness amendment.

Mr. Chairman, I yield back the remainder of my time.

Mr. HYDE. Mr. Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment.

Mr. Chairman, with some reluctance I oppose the amendment of my good and valued friend, the gentleman from Ohio (Mr. Kindness), but if we take the prisons out of this bill, we leave an enormous segment of people, of human beings, despite the circumstance which forced them to be confined, vulnerable to the very practices and patterns that this bill is designed to eradicate. It is particularly appropriate in my State of Illinois, certainly not one of the poorer States of the Union, where the prisons are literally run by street gangs from the city of Chicago and the guards are terrorized by them. God help someone if he is convicted of some offense and is thrown in there.

It does not do to say that the Attorney General will correct the situation, the State legislature will correct the situation, the John Howard Association will cor-

rect the situation. It has persisted. It has persisted for years. It is not getting better.

Meanwhile, the priorities and attention of our State legislatures throughout the country, our Congress, are attracted to other things.

We have advocates for funding the humanities and the arts. We have advocates for highways. We do not seem to have any people lobbying to make the prison conditions a little less barbaric than they have been year after year after year.

Now, I do not want to impose burdensome costs on the already limited treasuries of the States and they are demanding balanced budgets of the Federal Government. Some of them have surpluses, but, believe me, if you have a certain amount of tax dollars available to you you must have your priorities. Treating human beings like animals in a zoo, which might be an improvement for the way they are treated in some of the jails, and in the jails in my own State I am ashamed to admit, it does not seem to me the way we ought to go.

This bill simply provides one more door to walk through under certain controlled conditions. Prisoners, the prison system and penal reform is the great untapped, unresolved problem of our time. I submit that to pass this amendment would be a giant leap backward from doing the slightest little thing about this problem and I hope this amendment is defeated.

Mr. GUDGER. Mr. Chairman, I move to strike the requisite number of words and I will speak in opposition to the amendment.

I wish to commend the gentleman who has just spoken for his very clear definition of a very tragic problem that does exist in America. That is to provide more humane treatment in our prisons.

I would point out to the proponent of this amendment that this bill has been very, very carefully balanced to afford the States considerable protection against arbitrary or abusive institution of actions by the Attorney General, or anyone on his staff, in the provision requiring that the Attorney General must communicate with the Governor, with the attorney general of the State involved, and with the director of its prison system and give opportunity for correction of any constitutional abuses which may be gravamen of his complaint.

In addition to that, there is a process here which has peculiar application to the prison problem, and it is in section 4 of the act, in that, in any State where there has been an inmate grievance procedure adopted (so that the grievances and protests of prison inmates may have a due process proceeding) there is a stay order available so that the civil action cannot proceed until that grievance proceeding has been exhausted. This has application only to the prison problem.

As pointed out by the chairman in his opening remarks in opposition to this amendment, with which I fully concur, only the deprivation of a constitutional right can trigger any action by the Attorney General against the State on account of any abuse of adult prisoners.

We do not have as broad a spectrum of relief for them as is afforded for others.

Mr. Chairman, I contend the bill has been very, very carefully reasoned out and when the subcommittee and the committee declined or rejected this amendment proposed by the gentleman from Ohio (Mr. Kindness), in all good faith I know, they did so feeling that this is a segment of society where the institutionalized particularly require the professional attention of the Attorney General. I am immensely gratified to be able to point out that the Attorney General's representative in testifying before our committee said he did not anticipate that in all this spectrum of litigation there would be more than four or five cases per year instituted by that office, including prison offenses.

Mr. KINDNESS. Mr. Chairman, will the gentleman yield to me?

Mr. GUDGER. I will be happy to yield to the gentleman from Ohio.

Mr. KINDNESS. Mr. Chairman, on the last point the gentleman made, I think he has just pointed up why we do not need this bill. The Attorney General, himself, has said 4 or 5 cases a year would be involved. Let us take that part out.

I just wonder if the gentleman would agree, however, that nearly all the situations which give rise to deprivation in jails and prisons involve the need for more funds. That is more personnel, better facilities and what have you, so as to maintain the kind of control so we do not have in the jails and prisons the kind of situation to which the gentleman from Illinois (Mr. Hyde) referred.

It all takes money and there is no money in this bill. We have given every consideration to the States except the ability to overcome the problems.

Mr. GUDGER. I would like to respond in this fashion. In North Carolina we found ourselves confronted with a burgeoning prison population. We had to adopt an automatic parole procedure. We had to increase the size of our parole board.

We had to do many things to try to reduce that popnlation so they could have more humane conditions as a result of a reduced population.

There are many ways to deal with this problem other than spending additional dollars.

Mr. RAILSBACK. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, under the leadership of the chairman of this subcommittee, the Subcommittee on Courts, Civil Liberties and Administration of Justice, for about the last 4 years has been making a series of visits to correctional facilities. I must say before we embarked on our prison visits and our jail visits I really had no idea, I had no idea what the conditions were in many of our correctional facilities. I want to preliminarily point out that the conditions are not only bad in some institutions for the inmates or the offenders, they are very bad for the people who are the correctional officers or guards.

Without a doubt, most of the facilities we visted are archaic, they are outmoded and they are antiquated. However, in many of our correctional facilities in this country, the prison administrators are well motivated. They are as well motivated as we are. The correctional officers are well motivated, a majority of them trying to do a good job under tremendous adverse circumstances.

However, without a doubt, there are some institutions, some few institutions in some few States where, when we visited with the inmates, we were told of tear gassing, we were told of hosings, we were told of assaults and, as I understand it, the thrust of this bill is meant to deal with those very few instances where three things have happened:

First, there has been a system or pattern of abuse.

Second, there must be grievous harm to the people who have been abnsed or deprived of their constitutional rights.

A third thing is mentioned by my friend, the gentleman from North Carolina (Mr. Gudger). We made a distinction in this bill, kind of an accommodation, so that we distinguish between the treatment that we protect as far as mental health people and prisoners are concerned.

A final point I want to make is before the Attorney General could ever move into a State there would have to be those three things, including a deprivation of constitutional rights.

So I think with all the protections that we afford in this bill it would be tragic to take out prisoners when we know that there are something like 300,000 prisoners in our Federal and State penitentiaries, 36 percent of that number under the age of 25; so I urge the defeat of the amendment.

Mr. BETHUNE. Mr. Chairman, will the gentleman yield?

Mr. RAILSBACK. I yield to the gentleman from Arkansas.

Mr. BETHUNE. Mr. Chairman, I would like to ask the gentleman, the bill says in section 2 that whenever the Attorney General has reasonable cause to believe that this might occur. I would like to ask the gentleman, who would investigate the allegations and how would that process be carried out?

Mr. RAILSBACK. As I understand it at the present time, there is a special litigation section which is responsible for the institutions' litigation and it presently has a staff of 30 people. There are 18 lawyers and others of professional and clerical personnel.

It would be our expectation, incidentally, that we would not have to really raise the staff level, because there already is a staff in place. My understanding is that there have been some cases, for instance, when the court itself has actually asked the Department of Justice to investigate. I think there have been others where maybe an inmate has alleged a pattern of abuse or extensive pattern of abuse. Then I think that the litigating section that I mentioned would be the ones that would send out a team and would investigate; but it is most important, I think, to remember that before anything would be initiated, there would have to be notice to the State to try to permit it to correct whatever might be the alleged deficiency.

The CHAIRMAN. The time of the gentleman from Illinois (Mr. Railsback) has again expired.

(At the request of Mr. Bethune, and by unanimous consent, Mr. Railsback was allowed to proceed for 2 additional minutes.)

Mr. BETHUNE. Mr. Chairman, if the gentleman will yield further, I understand that presently throughout the country there are a great number of lawsuits that are being tried in the Federal district courts to try to decide minimum standards for certain institutions.

I wonder if the gentleman has any idea how many manhours are being spent by private attorneys in those cases now and in the event this legislation is passed

will the Attorney General then be responsible for taking over that sort of litigation and, if so, how will he meet that burden, inasmuch as I anticipate n deluge of complaints once this law is enacted.

Mr. RAILSBACK. Mr. Chairman, if I could just respond, I think that it is our belief that this would not result in any kind of deluge. As a matter of fact, the witnesses that testified before our committee indicated that they would use this very sparingly, that is my understanding. As a matter of fact, they believe it is only necessary for two additional staff attorneys.

I think the Justice Department is not going to either initiate or intervene unless there is a really serious pattern of abuse.

I would also say to the gentleman that that really, as I understand it, is our intent. We do not want the Department of Justice to go out with an increased bureaucracy to run all over the country looking for problems; but we do think we need this authority which they once had, which I think in the past they used very wisely.

Mr. KINDNESS. Mr. Chairman, will the gentleman yield?

Mr. RAILSBACK. Yes, if I have the time, I will yield.

Mr. KINDNESS. Mr. Chairman, for further elucidation on that, I was trying to find it in the committee report, but there is a place in the committee report where it says the Justice Department can call on the FBI, of course, to conduct thorough investigations of institutions, taking photographs and collecting relevant data on institutional conditions and the Department then, we are told, can call upon the Federal Bureau of Prisons, the LEAA, and even the Department of Health, Education, and Welfare, to evaluate that data.

Mr. SAWYER. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I rise in opposition to the amendment. I want to say, I find it a little strange to have the argument advanced that we should include money in the bill to, in effect, subsidize or pay a State to not deprive a citizen and a resident of his constitutional rights. It seems to me that any State that opts to institutionalize people has an inherent obligation of according to them their legal and constitutional rights.

Very recently in Michigan on referendum we repealed or voted to eliminate good time in our prisons. As our Governor, Governor Milliken, recently pointed out, this is going to require the building of some four additional penal institutions in the State and he also pointed out that by voting to eliminate good time he felt there was a clear implied authority by the people of the State to bear the additional tax burden of constructing those institutions. I see no argument, based on the fact that we are not providing money to the States so that they will accord their people the rights protected to them under the Constitution.

Mr. FISH. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, if I could address a question to complete this colloquy with the ranking member of the subcommittee, we were in the midst of discussing the issue from the point of view of whether or not this is going to be an increase in the bureaucracy. In response to the gentleman's question, the gentleman referred to the special litigation section existing in the Justice Department in dealing with institutionalized litigation matters.

Was it not the testimony of the Justice Department that it was their expectation that with the enactment of H.R. 10 we would not increase appreciably the number of suits which the Department has been involved in?

Mr. RAILSBACK. Mr. Chairman, would the gentleman yield?

Mr. FISH. I would be happy to yield to the gentleman from Illinois.

Mr. RAILSBACK. Yes; that is exactly my understanding. If I could, I would just like to mention that there are 24 so-called mental health type cases presently pending. Ten of those are amicus; 14 are the plaintiff-intervenor status, and then there are 16 relating to prisons or jails. Of that number, 6 are amicus and 10 are plaintiff-intervenor status.

Now, I think it is significant that even including the *Solomon* case, which is the reason we are acting today, there were only three instances where the Department of Justice had initiated.

Mr. FISH. Mr. Chairman, may I ask one other question of the gentleman that I think is important. Let us assume this amendment prevails——

Mr. RAILSBACK. Let us hope not.

Mr. FISH. There are avenues for the inmate to pursue in the exercise of his constitutional rights, but would not the gentleman say that in the absence of the presence of the Attorney General of the United States, it would be very difficult for one prisoner to ever prove adequately in court a pattern and practice existing throughout the entire institution.

Mr. RAILSBACK. Well, if the gentleman wonld yield, I wonld think that it would be extremely difficult to prove. I think it is true probably only in the most heinous type cases.

Mr. BETHUNE. Mr. Chairman, will the gentleman yield?

Mr. FISH. I am glad to yield to the gentleman from Arkansas.

Mr. BETHUNE. Mr. Chairman, the gentleman's inquiry seems to go to the qnestion of how many attorney man-hours would he used in the event that this amendment fails, both in the Department of Justice and perhaps at the State level. Perhaps the gentleman knows, I spent 4 years in the FBI investigating cases. I am not so much concerned with the amount of attorney hours, either in the Department of Justice or at the local level that would be spent on suits of this nature. What I am concerned about is the amonnt of investigative hours that wonld he nsed when the FBI is already overburdened with investigative matters. I am concerned to know whether or not the committee inquired of the FBI whether or not they could handle the additional workload here.

Mr. FISH. Well, I am not in a position to answer the gentleman, but I would be glad to yield to the gentleman from Ohio (Mr. Kindness).

Mr. KINDNESS. Mr. Chairman I thank the gentleman for yielding. Not being a member of the subcommittee, I also did not hear anything on this; but my understanding on this is, and the committee report indicates that, the hurden of investigation would be placed on the FBI.

There is no qnestion that just on the basis of reasonahle speculation there will be quite an upsurge in demand for investigative time. The Department of Health, Education, and Welfare can also be called upon, and if we do not have any estimate of what it would cost over there, I think it is rather ahsurd to have before us a committee report pointing out that it is projected this bill is only going to cost $81,000 in fiscal year 1980. That is just unbelievable, unreal, and unrealistic.

Mr. BETHUNE. Mr. Chairman, if the gentleman will yield further, as the author of the amendment I am sure he sees my point. While we can cite the number of cases that are being tried along this line in Federal district court, that is one thing. Bnt that is only the tip of the iceberg.

The CHAIRMAN. The time of the gentleman from New York (Mr. Fish) has expired.

(On request of Mr. Bethune, and by unanimous consent, Mr. Fish was aliowed to proceed for 2 additional minutes.)

Mr. BETHUNE. Mr. Chairman, will the gentleman yield fnrther?

Mr. FISH. I yield to the gentleman from Arkansas.

Mr. BETHUNE. Mr. Chairman, that is just the tip of the iceberg. Beneath the surface there are a great many investigative man-hours that are burned up in this kind of investigative work.

I am concerned to know, before I vote on this measnre, just what the expectation is in that regard. I envision under the bill as drawn that the Attorney General might have a reasonable cause to believe that if he were to receive two affidavits from an inmate in a penitentiary, that would immediately cause him in the interest of thoroughness to ask the FBI to undertake an investigation.

Mr. FISH. Mr. Chairman, I will yield to a member of the subcommittee to respond.

Mr. RAILSBACK. Mr. Chairman, will the gentleman yield?

Mr. FISH. I yield to the gentleman from Illinois.

Mr. RAILSBACK. Mr. Chairman, I want to thank the gentleman for yielding.

Let me just read one other part of the testimony by the Justice Department which I think I neglected to read before, and that is this:

"It wonld be our expectation that with the enactment of this legislation we would not increase appreciably the number of suits that we have been involving onrselves in."

So my reaction is that they do not expect to do much more or impose any more hardships on even the Federal Bureau than they have in the past, and when we look at their history of involvement in the past, it really is quite minimal.

Mr. HYDE. Mr. Chairman, will the gentleman yield?

Mr. FISH I yield to the gentleman from Illinois.

Mr. HYDE. Mr. Chairman, I thank the gentleman for yielding.

I do not think there is any mandate that the FBI handle all these investigations. Many of them are done by newspapers and by undercover people. They can be done by the John Howard Association and people who are concerned, incinding the League of Women Voters, whose members visit nursing homes and places like that. It does not have to he the FBI.

Mr. Chairman, when we start putting a dollar sign on people's constitutional rights, our priorities are getting mixed up.

The CHAIRMAN. The time of the gentleman from New York (Mr. Fish) has expired.

The question is on the amendment offered by the gentleman from Ohio (Mr. Kindness).

The question was taken; and on a division (demanded by Mr. Kindness) there were—ayes 5, noes 18.

Mr. KINDNESS. Mr. Chairman, I demand a recorded vote, and pending that, I make the point of order that a quorum is not present.

The CHAIRMAN. Evidently a quorum is not present.

The Chair announces that pursuant to clause 2, rule XXIII, he will vacate proceedings under the call when a quorum of the committee appears.

Members will record their presence by electronic device.

The call was taken by electronic device.

QUORUM CALL VACATED

The CHAIRMAN. One hundred Members have responded. A quorum of the Committee of the Whole is present. Pursuant to rule XXIII, clause 2, further proceedings under the call shall be considered as vacated.

The Committee will resume its business.

The pending business is the demand of the gentleman from Ohio (Mr. Kindness) for a recorded vote.

Does the gentleman from Ohio insist on his demand for a recorded vote?

Mr. KINDNESS. Mr. Chairman, I do indeed insist on my demand.

A recorded vote was refused.

So the amendment was rejected.

AMENDMENT OFFERED BY MR. KINDNESS

Mr. KINDNESS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Kindness: On page 9, line 15 strike "or for any other State purpose".

Mr. KINDNESS. Mr. Chairman, the purpose of this amendment is to make it clear that this bill will not cover such things as the operation of public schools. That may seem just a little bit of a stretch, when you read the language of the bill that is sought to be dealt with, but if you will look carefully at the definition of "institution" on page 9, and then look at the exculpatory language included in the committee's report on page 18, you will see that the committee report deals somewhat tenderly with the subject of whether the language "or for any other State purpose" belongs in this bill.

The problem with the definition of the word "institution" is that it would allow to be covered by the bill any facility or institution for juveniles held awaiting trial or residing for purpose of receiving care or treatment," or for any other State purpose."

Juveniles are indeed held in schools until the bell rings, at least—and we all remember that—for a State purpose: education.

That alone would not worry me quite so much, but then if we look at the committee report, on page 18, near the bottom, says:

The fourth facility or institution covered is any which is "for juveniles held awaiting trial or residing for purposes of receiving care or treatmeut or for any other State purpose". It is the intent of the committee that the term "juveniles" as used in this act means persons who are treated as juveniles by the relevant State or political subdivision of the State in which the institution is located or from which the juvenile has been placed. This term is intended to include any home, orphanage, residential school, or any housing or education setting in which juveniles reside or are held for any State purpose. The committee does not intend to cover non-residential elementary or secondary schools, or public colleges and universities.

There is no other State purpose that has been cited to be considered. Why do we resort to confusing statutory language, namely, "or for any other State purpose," when nobody can tell us what it is there for and we have such rather odd language in the committee report to further confuse this situation?

Indeed, the language in the committee report muddies the water considerably, and I think that it is intended to include any education setting in which juveniles are held for any State purpose.

Now we must strike this language from the bill in order to clarify it, but those who will argue in opposition to this amendment will tell you, "Well, it is perfectly clear. The committee report makes it clear."

Why do we write bills, why do we write laws, that are confusing and uncertain and ambiguous? I do not know why, but we do it all the time. Sometimes we include such exculpatory language as is on page 18 of the committee report, but it does not help, because the words of the bill are clear enough that a court can determine that another State purpose is being served; and the court is not going to look at the legislative history if that is the case.

We have before us an amendment that allows us to clarify the bill in at least one important respect. I do not quite understand why the proponents of this measure have been so jealous of its provisions and so certain that they are right in every jot and tittle and every word that is in the bill, but here is one clearcut case where no purpose has been cited for the existence of the language that this amendment seeks to strike.

Let us do it.

Mr. KASTENMEIER. Mr. Chairman, I rise in opposition to the amendment.

This language has been in this legislation and in predecessor legislation in the last Congress as a result of testimony by both the Department of Justice and the Children's Defense Fund.

The language is necessary, because some States do place juveniles in facilities for purposes other than for care or treatment, such as protection. Sad as it may seem, some juveniles under State protection have come to great harm.

We do not want to exclude from coverage any juvenile residential facility which the State may use for some purpose other than solely care or treatment.

As was pointed out, the report at page 18 makes it very clear the bill does not cover nonresidential elementary or secondary schools or public colleges or universities.

I might parenthetically add, the gentleman from New York (Mr. Biaggi), is not here today. If he were, he would like to have raised the question of whether certain foster homes in which the State either operates or places children under certain conditions would be included. Such foster homes, of course, in part are for the purpose of protection of children, sometimes from parental abuse. This is the area particularly we want to protect.

I would have in a colloquy told the gentleman from New York (Mr. Biaggi), that the term the gentleman from Ohio wishes to strike would have protected the children he sought to protect.

Mr. Chairman, I urge that the amendment be defeated as it was in the committee.

Mr. KINDNESS. Mr. Chairman, will the gentleman yield on that point for clarification?

Mr. KASTENMEIER. I am happy to yield to the gentleman from Ohio (Mr. Kindness).

Mr. KINDNESS. Is the gentleman indicating that the interpretation that would be appropriate is that foster homes where juveniles are placed for protective care, would indeed be covered by this language?

Mr. KASTENMEIER. Not necessarily the home itself, unless the home were an institution wherein a pattern or practice could exist where a sizable number of juveniles were assigned by the State for a State purpose.

If the home were an individual home, a residential home, operated by, we will say, a family, and where there are only one or two children, then the home itself would not be included, but the State could be cited if its pattern or practice of assignments constituted collectively in the aggregate an abuse. That would be covered in terms of the State and the State act itself.

Mr. KINDNESS. Would the gentleman agree, though, that in those cases we are talking about care, residential care, that is already offered in one way or another? I am still having difficulty with "any other State purpose."

Mr. KASTENMEIER. I do not agree with the gentleman that "care" necesarily covers that situation.

For that reason, we would urge the defeat of the gentleman's amendment, so that we could be clear that this particular type of situation could be covered.

Mr. KINDNESS. But the gentleman would say though that the coverage of the bill could extend as far as foster care in an institutionalized setting with numbers of people residing there, and it could further extend to the problems that the State has or might have in administering a program in a nonconstitutional way involving the placement of juveniles in private homes for foster care?

Mr. KASTENMEIER. The gentleman is correct. I would like to take a moment to address one other issue.

Some have expressed the concern that the Department of Justice will somehow be empowered to determine medical policy under this legislation. While I can appreciate this concern, the intent of this legislation is to empower the Attorney General only to seek Federal court ordered relief from violations of constitutional and other Federal rights. It will be the courts which determine if constitutional minima are being ignored to such a degree that medical care and other professional services must be addressed, and in making that judgment the courts would most appropriately consult expert medical and professional witnesses who would guide the courts in fashioning appropriate equitable relief.

Mr. LUNGREN. Mr. Chairman, I move to strike the requisite number of words.

(Mr. Lungren asked and was given permission to revise and extend his remarks.)

Mr. LUNGREN. Mr. Chairman, I rise in support of this particular amendment.

I support this bill because I think the reasons for it are worthy and that there is an absolute necessity for this type of approach for the various reasons that have been articulated here.

But I do think we ought to take a look at this particular amendment; because I think it points out one of the problems that seems to arise when we attempt to put good, legitimate reasoning into legislation, and that is the possibility of overreaching or overstatement.

Despite the fact that our particular report suggested that the phrase "or for any other State purpose," does not in this instance refer to schools, I would suggest that there would be a very easy interpretation to be utilized by a court at some future date.

Not only that, there has been some talk about particular circumstances with respect to foster-home situations. If that happens to be a purpose of this bill, then I think we ought to spell it out and not leave language as open-ended as "or for any other State purpose." Certainly, I cannot stand here in this well and try to conceive of all those "legitimate" interpretations that will come under such an open-ended statement.

I suggest that no one here could stand in this well and tell us exactly what that means, what "reasonable" interpretations are to be found by courts and by the Attorney General in attempting to carry out what he thinks the mandate of this bill is.

Overall, I think this is a worthy bill. I think it needs the support of my colleagues. But it needs improvement. I ask that my colleagues support this amendment so that we will not have an openended section of the bill. Even though we have attempted, in one report, to possibly eliminate its coverage for school systems, we have not fully thought out the other circumstances that could just as "reasonably" apply and for which this would be in overreaching.

This bill is to help us take care of extreme examples in an area where many levels of Government—State, local, and Federal—have not taken a real hard look—such as prisons, and institutions that care for those who are disabled in one way or another. But really, let us not allow ourselves to use language that would extend this to areas that we do not consider here, that we do not imagine at this present time, and which would lay us open to the criticism that this is a bill which really does overreach the proper functions of the Federal Government.

Mr. RAILSBACK. Mr. Chairman, I rise to strike the last word.

Mr. Chairman, I am concerned about the amendment for a practical reason, and I would feel much more assured if I could be persuaded that the bill would cover the various people who are in custody of the State for something other than treatment or care.

One of the reasons that I am worried about striking out this language is the case called Gary W. against Stewart, which is a Louisiana case, which raises some questions, at least in my mind—that if we strike this language, we may unintentionally be omitting some of the categories of people who were involved in the Gary W. case.

In the Gary W. case, the Department intervened to enjoin Louisiana from its practice of sending—and note these categories—"emotionally disturbed, mentally retarded, deliquent, neglected, and abused children to privately operated child-care facilities in Texas."

The Department conducted discovery in 38 child-care facilities spread across the State of Texas, and documented such practices as child beatings, solitary

confinement, massive overdrugging, and even willful refusal to provide lifesaving medical care. What I am worried about is whether, if we strike this language, we may be leaving out, for instance, children that are simply under the care of the State or have perhaps been farmed out to another State to provide that care. So, I think when we recognize that, and then when we read the language of the report which goes to the concern expressed by my friend from Ohio (Mr. Kindness), then I think we should oppose the amendment.

I want to mention that the report language says this:

It is the intent of the committee that the term "juveniles" as used in this Act means persons who are treated as juveniles by relevant State or political subdivisions of the State in which the institution is located, or from which the juvenile has been placed.

This is the question remaining:

This term is intended to include any home, orphanage, residential school or any housing or education setting in which juveniles reside or are held for that State purpose. The committee does not intend to cover nonresidential elementary or secondary schools or public colleges and universities.

I kind of think that report language handles the problem.

Mr. KINDNESS. Mr. Chairman, will the gentleman yield for clarification?

Mr. RAILSBACK. I yield.

Mr. KINDNESS. I was having a little difficulty with the explanation of the gentleman's position with regard to these other purposes that might be involved. Earlier there was cited an example of a juvenile receiving care in some unusual setting, but it does seem to me that there ought to be more confidence in the language already in the bill preceding this that defines "institution" to include facility or institution for juveniles held awaiting trial or residing for the purposes of receiving care or treatment.

That seems to be really fairly broad, and covers most of what we could possibly contemplate, but then we follow that with, "or for other State purposes."

I still cannot understand that the language preceding that is not adequate.

Mr. RAILSBACK. If I could just respond by saying that I understand the gentleman's concern which he has expressed very well. On the other hand, I guess that I am concerned that if we adopt the gentleman's amendment we may be omitting from the coverage of our bill somebody that may not literally be receiving treatment or care, but may be in custody; somebody that may be a neglected child, not receiving any treatment or care, but simply in custody.

The CHAIRMAN. The time of the gentleman from Illinois has expired.

(At the request of Mr. Kindness and by unanimous consent, Mr. Railsback was allowed to proceed for 2 additional minutes.)

Mr. KINDNESS. If the gentleman would yield further on that——

Mr. RAILSBACK. I would be happy to yield.

Mr. KINDNESS. My concern is that there has been no example cited that I can understand that says there is a problem that exists someplace else within this broad range of "or for any other State purpose."

Does the gentleman have a feeling that there has been an abuse that has to be dealt with?

Mr. RAILSBACK. The one example I cited, which as the gentleman knows is the Gary W. case, and the categories were cited in that case. I am not sure whether the existing language, if we adopt the gentleman's amendment, would really cover all these categories. I guess I am particularly concerned.

Mr. KINDNESS. Mentally retarded, delinquent, neglected, and abused children.

Mr. RAILSBACK. What happened in that case is that they are not all juveniles. Some of them may be neglected children. They came under the custody of the State, maybe not for treatment or care, but they came under the custody of the State and then they were farmed out to Texas by the State of Louisiana, and then they documented that there were a number of instances where there was some very serious mistreatment of all of those categories of children.

Mr. KINDNESS. The gentleman would agree perhaps, that the other part of the definition would cover persons more broadly than juveniles who are mentally ill or retarded, and so forth?

Mr. RAILSBACK. Yes, I do.

Mr. KINDNESS. That is already covered.

Mr. RAILSBACK. I do concede that.

Mr. KINDNESS. But we are dealing here with just juveniles in this part of the definition, and with respect to just juveniles other than those receiving care or treatment, we do not know what it means.

Mr. RAILSBACK. I thought I just gave the gentleman an example.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Ohio (Mr. Kindness).

The amendment was rejected.

The CHAIRMAN. The question is on the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker pro tempore (Mr. Murtha) having assumed the chair, Mr. Oberstar, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee, having had under consideration the bill (H.R. 10) to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States, pursuant to House Resolution 241, he reported the bill back to the House with an amendment adopted by the Committee of the Whole.

The SPEAKER pro tempore. Under the rule, the previous question is ordered.

Is a separate vote demanded on the amendment to the committee amendment in the nature of a substitute adopted by the Committee of the Whole? If not, the question is on the amendment.

The amendment was agreed to.

The SPEAKER pro tempore. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER pro tempore. The question is on the passage of the bill.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. BAUMAN. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 342, nays 62, not voting 30, as follows:

[Roll No. 165]

YEAS—342

Abdnor	Blanchard	Clinger
Addabbo	Boggs	Coelho
Akaka	Boland	Coleman
Alhosta	Bolling	Collins, Ill.
Alexander	Boner	Conte
Ambro	Bonior	Corcoran
Anderson, Calif.	Bonker	Corman
Andrews, N.C.	Bouquard	Cotter
Andrews, N. Dak.	Bowen	Courter
Annunzio	Brademas	D'Amours
Anthony	Breaux	Danielson
Applegate	Brinkley	Daschle
Ashley	Brodhead	Davis, Mich.
Aspin	Broomfield	Davis, S.C.
Atkinson	Brown, Calif.	de la Garza
AuCoin	Buchanan	Deckard
Bafalis	Burgener	Dellums
Bailey	Burlison	Derrick
Barnes	Burton, John	Derwinski
Beard, R.I.	Burton, Phillip	Dickinson
Beard, Tenn.	Butler	Dicks
Bedell	Byron	Diggs
Beilenson	Campbell	Dingell
Benjamin	Carr	Dixon
Bennett	Cavanaugh	Dodd
Berenter	Chappell	Donnelly
Bethune	Chisholm	Dornan
Bevill	Clausen	Dougherty
Bingham	Clay	Downey

Yeas (continued)

Drinan
Duncan, Oreg.
Duncan, Tenn.
Early
Eckhardt
Edgar
Edwards, Ala.
Edwards, Calif.
Emery
English
Erdahl
Erlenborn
Ertel
Evans, Del.
Evans, Ind.
Fary
Fascell
Fazio
Fenwick
Ferraro
Findley
Fish
Fisher
Fithian
Flippo
Flood
Florio
Foley
Ford, Tenn.
Fountain
Fowler
Frenzel
Frost
Fuqua
Garcia
Gaydos
Gephardt
Giaimo
Gilman
Gingrich
Ginn
Glickman
Gonzalez
Gooding
Gore
Gradison
Gray
Green
Guarini
Gudger
Guyer
Hagedorn
Hall, Ohio
Hall, Tex.
Hamilton
Hammerschmidt
Hanley
Harkin
Harris
Harsha
Hawkins
Heckler
Hefner
Heftel
Hightower
Hillis
Holland
Hollenbeck
Holtzman
Hopkins
Horton
Howard
Hughes
Hyde
Ireland
Jacobs
Jeffords
Jenkins
Johnson, Calif.
Johnson, Colo.
Jones, N.C.
Jones, Okla.
Jones, Tenn.
Kastenmeier
Kazen
Kemp
Kildee
Kostmayer
LaFalce
Latta
Leach, Iowa
Leach, La.
Lederer
Lee
Lehman
Leland
Lent
Levitas
Lloyd
Long, La.
Long, Md.
Lowry
Lujan
Lungren
McClory
McCloskey
McDade
McHugh
McKay
McKinney
Madigan
Maguire
Markey
Marlenee
Marriott
Martin
Matsui
Mattox
Mazzoli
Mica
Michel
Mikulski
Mikva
Miller, Calif.
Mineta
Minish
Mitchell, Md.
Mitchell, N.Y.
Moakley
Moffett
Mollohan
Moorhead, Calif.
Moorhead, Pa.
Murphy, Ill.
Murphy, N.Y.
Murphy, Pa.
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Neal
Nedzi
Nelson
Nichols
Nolan
Nowak
O'Brien
Oakar
Oberstar
Obey
Ottinger
Panetta
Pashayan
Patten
Patterson
Pease
Pepper
Perkins
Petri
Peyser
Pickle
Preyer
Price
Pritchard
Pursell
Quayle
Quillen
Railsback
Rangel
Ratchford
Regula
Reuss
Rhodes
Richmond
Rinaldo
Roberts
Robinson
Rodino
Roe
Rosenthal
Rostenkowski
Roybal
Royer
Russo
Sabo
Santini
Sawyer
Scheuer
Schroeder
Schulze
Sebelius
Seiberling
Sensenbrenner
Shannon
Sharp
Shelby
Simon
Skelton

Yeas (continued)

Slack	Synar	Whitehurst
Smith, Iowa	Tauke	Whitley
Smith, Nebr.	Thompson	Williams, Mont.
Snowe	Traxler	Williams, Ohio
Snyder	Udall	Wilson, Bob
Solarz	Ullman	Wilson, C. H.
Spellman	Van Deerlin	Wilson, Tex.
St Germain	Vander Jagt	Winn
Stack	Vanik	Wirth
Staggers	Vento	Woiff
Stangeland	Volkmer	Woipe
Stanton	Walgren	Wydler
Stark	Walker	Wylie
Steed	Wampler	Yates
Stewart	Watkins	Yatron
Stockman	Waxman	Young, Fla.
Stokes	Weaver	Young, Mo.
Studds	Weiss	Zablocki
Swift	White	Zeferetti

NAYS—62

Archer	Grisham	Miller, Ohio
Ashbrook	Hance	Montgomery
Badham	Hansen	Moore
Barnard	Hinson	Mottl
Bauman	Holt	Paul
Broyhill	Huckaby	Rousselot
Carney	Hutto	Rudd
Cheney	Ichord	Satterfield
Cleveland	Jeffries	Shumway
Collins, Tex.	Kelly	Shuster
Conable	Kindness	Solomon
Crane, Daniel	Kogovsek	Spence
Daniel, Dan	Kramer	Stenholm
Daniel, R. W.	Lagomarsino	Stump
Dannemeyer	Lewis	Taylor
Devine	Livingston	Thomas
Edwards, Okla.	Loeffler	Treen
Gibbons	Lott	Whittaker
Goldwater	McCormack	Whitten
Gramm	McDonald	Wyatt
Grassley	McEwen	

NOT VOTING—30

Anderson, Ill.	Ford, Mich.	Rahall
Baldus	Forsythe	Ritter
Biaggi	Hubbard	Rose
Brooks	Jenrette	Roth
Brown, Ohio	Leath, Tex.	Runnels
Carter	Luken	Stratton
Conyers	Lundine	Symms
Coughlin	Marks	Trible
Crane, Philip	Mathis	Wright
Evans, Ga.	Mavroules	Young, Alaska

The Clerk announced the following pairs:
Mr. Baldus with Mr. Marks.
Mr. Biaggi with Mr. Anderson of Illinois.
Mr. Runnels with Mr. Brown of Ohio.
Mr. Wright with Mr. Forsythe.
Mr. Brooks with Mr. Ritter.
Mr. Ford of Michigan with Mr. Roth.
Mr. Jenrette with Mr. Young of Alaska.
Mr. Leath of Texas with Mr. Coughlin.

Mr. Stratton with Mr. Symms.
Mr. Rose with Mr. Trible.
Mr. Rahall with Mr. Philip M. Crane.
Mr. Lundine with Mr. Mathis.
Mr. Conyers with Mr. Carter.
Mr. Evans of Georgia with Mr. Mavroules.
Mr. Hubbard with Mr. Luken.
Mr. Murphy of New York changed his vote from "nay" to "yea."
Mr. Lewis changed his vote from "yea" to "nay."
So the bill was passed.
The result of the vote was announced as above recorded.
A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. KASTENMEIER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill, H.R. 10, just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

[From the Congressional Record, May 24, 1979]

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS

SPEECH OF
HON. ROBERT W. KASTENMEIER
OF WISCONSIN
IN THE HOUSE OF REPRESENTATIVES
May 23, 1979

(The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 10) to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.)

Mr. KASTENMEIER. Mr. Chairman, I would like to commend the gentleman from Virginia (Mr. Butler) for his contribution to the bill. As the gentleman is aware, many of his suggestions have been incorporated into the text of the bill.

For the benefit of the Members, I would like to also state that at page 6 of the report there appears the very important letter the gentleman from Virginia elicited from the Justice Department. I think that letter reassures or should reassure the membership of what the intentions of the Justice Department are in this regard.

APPENDIX 2—MATERIALS SUBMITTED BY THE DEPARTMENT OF JUSTICE

a. Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice, statement before the United States Senate, Committee on Human Resources, Subcommittee on Child and Human Development, concerning the abuse of children in institutions, January 24, 1979.
b. Honorable Griffin B. Bell, Attorney General of the United States, letter dated February 14, 1979, to C. Raymond Marvin, Washington Counsel, the National Association of Attorneys General.

U.S. DEPARTMENT OF JUSTICE

WASHINGTON, D.C.

STATEMENT OF DREW S. DAYS III, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

I thank the Subcommittee for this opportunity to appear today and to testify about a subject which has been of great concern within the Department of Justice—the abuse of children in institutions.

As defined in the Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101–5106, child abuse and neglect means the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person responsible for the child's welfare under circumstances which harm or threaten the child's health or welfare. When this legislation was enacted in 1974, the definition was intentionally written broadly enough to take into account the fact that, for many of our nation's children, the person responsible for their welfare is employed by some kind of institution. As Chairman Cranston's invitation to testify noted, the Department of Justice has, since 1971, been involved as an intervenor or litigating amicus curiae in a number of cases concerning the constitutional rights of confined persons, and in several of those cases there has been substantial evidence of abuse of children, as defined in the legislation which is the subject of these hearings.

As the Chairman also noted, legislation was under consideration during the prior Congress, and has been introduced in this Congress, to give the Attorney General explicit authority to institute suits against particular classes of institutions where he has reasonable grounds to believe that persons are being deprived of their constitutional rights. I am speaking of S. 10 and H.R. 10, which were introduced on January 15, 1979.[1]

When I testified before the Senate and House subcommittees having jurisdiction over the bills which were under consideration in the prior Congress, I stated that there were two reasons why such authorizing legislation was necessary. The first is that the experience of the Department in the litigation to which I referred earlier has demonstrated that basic constitutional and federal statutory rights of persons confined in institutions are being violated on such a systematic and widespread basis to warrant the attention of the federal government. The second reason why an authorizing statute is needed stems from the fact that some courts have held that the federal government lacks the power to bring such suits absent authorization from Congress.[2] One court has been suggested that the United States lacks the requisite standing to intervene in an ongoing private suit.[3] While the United States is continuing to participate in litigation where the courts have allowed, the future is uncertain without passage of S. 10 and H.R. 10.

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[1] The corresponding bills for the 95th Congress were S. 1393 and H.R. 9400.
[2] *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md. 1976), aff'd. 563 F.2d 1121 (4th Cir. 1977); *United States* v. *Mattson*, No. CV74–138–BU (D. Mont.), appeal argued Nov. 8, 1978, No. 76–3568 (9th Cir.).
[3] *Alexander* v. *Hall*, C.A. No. 72–209 (D. S.C.), order of June 16, 1978.

I have been asked to testify specifically today about the abuse of children in institutions with which the Department of Justice is familiar through its litigation, our perception of the extent of the problem, and any suggestions for effective methods of dealing with institutional abuse of children.

EXPERIENCE OF THE DEPARTMENT OF JUSTICE

Beginning with our experience, the Department has participated in cases involving several kinds of institutions in which persons under eighteen years of age are confined, including facilities for mentally ill and mentally retarded persons and juvenile detention facilities. In those cases, the following types of abuses against children have been found to have occurred.

In a case styled *Gary W. and United States* v. *Stewart*, C.A. No. 74-2412-C (E.D. La.), the federal district court found that the State of Louisiana had placed delinquent and dependent children in private care facilities in the State of Texas where in some cases children were being abused and overdrugged and in which treatment was inadequate. When the medical experts employed by the United States in its capacity as plaintiff-intervenor visited a private child care facility in Houston, Texas, they found a 7-year old severely mentally retarded boy in such a malnourished state that he was near death. We sought and obtained from the district court an emergency order requiring Louisiana state officers to remove the child from the facility and to transport him to a nearby medical center.[4] I am happy to report that his life was saved. After trial of the case, the court entered an order detailing the following conditions found in the private facilities in Texas:[5]

Children tied, handcuffed or chained together or to fixtures as a means of control and discipline;

Children being fed while lying down, which created a danger of food being aspirated into their lungs;

Excessive use of psychotropic drugs coupled with unsafe storage and administration of drugs;

Mentally retarded children being cared for by other mentally retarded children;

Confining children to cribs as virtual cages;

Discretion given to ward attendants to use restraints as needed;

In one institution, an administrator who abused children by hitting them with her hand or a soup ladle and who tied one child to her bed or kept her in a high chair all day;

Lack of programs of physical care and stimulation so that children actually regressed while in the facilities.

The court's order required the State of Louisiana to assure that out-of-state facilities in which children were placed meet minimum standards of care and treatment and ordered the state to remove children from the worst facilities.

The United States also intervened in a case involving the Pennhurst State School and Hospital, located in Spring City, Pennsylvania, *Halderman, et al.*, v. *Pennhurst State School and Hospital, et al.*, C.A. No. 74-1345 (E.D. Pa.). A residential institution for the mentally retarded, Pennhurst at the time of trial housed approximately 1230 persons, many of them children. The following are examples of the abuse suffered by children at Pennhurst as found by the district court.[6]

In 1972, an eleven year old resident strangled to death when tied in a chair in "soft" restraints.

One of the named plaintiffs, admitted when she was twelve years old, had 40 reported injuries on her medical records in the eleven years she was at Pennhurst, including the loss of several teeth, a fractured jaw, fractured fingers and a toe and numerous lacerations, cuts, scratches and bites. Although she had a limited vocabulary at the time of her admission, she was no longer speaking at the time of trial.

One parent testified that in seven years of weekly visits to her son, there were only four occasions on which he was not injured. She reported at trial that she had recently observed cigarette burns on his chest.

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[4] Order of Oct. 29, 1975.
[5] Order of July 26, 1976.
[6] Opinion and Order of Dec. 23, 1977.

Another child was hospitalized for two weeks because of head and face injuries received as a result of a beating by another resident.

A 17 year old blind and retarded girl who could walk was found by her parents strapped to a wheelchair by a straitjacket. She had experienced regression while at Pennhurst as a result of a lack of activities and spent most of her time sitting and rocking.

The children at Pennhurst were also subjected to the general poor conditions in the institution which affected the adult residents as well, such as the fact that routine housekeeping services were not available during evenings and weekends with the result that urine and feces were commonly found on the ward floors during these periods. There were often outbreaks of pinworms and other infectious diseases. The Court found that "[o]bnoxious odors and excessive noise permeate the atmosphere at Pennhurst" and that "[s]uch conditions are not conducive to habilitation," Opinion, *supra*, at p. 32. As in the Texas institutions in the *Gary W.* case, the court also found excessive use of psychotropic drugs as a control mechanism.

Conditions equally atrocious were found to exist in the Willowbrook State School for the Mentally Retarded in New York. The United States participated in the Willowbrook litigation as litigating *amicus curiae*,[7] and the case was mentioned in connection with Congressional consideration of the Bill of Rights for for the Developmentally Disabled.[8] The failure of the staff at Willowbrook to protect the physical safety of the children housed there is evidenced by the testimony of parents that their children had suffered.

Loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds * * *.

357 F. Supp., *supra*, at 756. During the trial the United States presented evidence of severe skill regression, loss of IQ points, and loss of basic physical abilities such as walking, during the time that the children were housed in what was known as the Baby Complex at Willowbrook. The average eleven year old child in the Complex weighed 45 lbs. as compared to the weight of an average eleven year old of 80 lbs.

Turning to another type of facility, the United States participated as litigating *amicus curiae* in *Morales v. Turman*,[9] by order of the court, to assist in determining the facts concerning the Texas state juvenile reformatories in which minors adjudged delinquent were involuntarily committed.

The district court in that case found a climate of brutality, repression, and fear, 364 F. Supp. at 170. Correctional officers at the Mountian View State School for Boys administered physical abuse including slapping, punching, and kicking of residents, some of whom had committed only such "status" offenses as truancy or running way from home. An extreme form of physical abuse used at the facility was known as "racking" and consisted of requiring the inmate to stand against the wall with his hands in his pockets while he was struck a number of times by blows from the fists of correctional officers.

Another form of abuse found by the court was the use of tear gas in situations where no riot or other disturbance was imminent. One inmate was tear-gassed while locked in his cell for failure to work, another was gassed for fleeing from a beating he was receiving, and another was gassed while being held by two 200 lb. correctional officers.

Juveniles were sometimes confined in security facilities consisting of small rooms or cells, for up to one month, for conduct not seriously disruptive or threatening to the safety of other persons or valuable property. Expert witnesses testified that such solitary confinement is an extreme measure which should only be used in emergencies to calm uncontrollably violent behavior. Experts agreed that when a child is left entirely alone for long periods, the resulting sensory deprivation can be harmful to mental health.

In addition to the harmful effects of the solitary confinement, inmates in some security facilities were required to perform repetitious make-work tasks, such as pulling up grass without bending their knees or buffing a floor for hours with a rag.

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[7] *New York State Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973) and *NYSARC & Parisi* v. *Carey*, 393 F. Supp. 715 (E.D. N.Y. 1975) (consent decree).

[8] 121 Cong. Rec. 29820 (1975).

[9] 364 F. Supp. 166 (E.D. Tex. 1973) and 383 F. Supp. 53 (E.D. Tex. 1974); rev'd for absence of a three-judge court, 535 F.2d 864 (5th Cir. 1976); rev'd and remanded for further proceedings, 430 U.S. 322 (1977); 562 F.2d 993 (5th Cir. 1977) (remanded for evidentiary hearing concerning whether there are changed circumstances).

Of necessity, I am able today to give the Subcommittee only a few illustrative examples of abuse of institutionalized children, and I invite you to examine some of the reported court decisions to which I have referred, the citations to which are given in my written statement. I have confined my examples today to those which have been found in cases already deciding rather than from cases which are presently pending in the courts. I wish to emphasize that by mentioning these cases I do not intend to single out the states involved for special reproach. We have seen similar conditions in twelve cases from eleven other states.

EXTENT OF THE PROBLEM

That brings me to the second issue which I was asked to address today—the Department's perception of the extent of the problem.

I think it would be safe to say that abuse of children in institutions is a wide-spread and serious problem, using the broad definition of child abuse contained in the Child Abuse Prevention and Treatment Act to which I referred earlier. Just judging from the cases which have been or are being litigated and from our investigation of other institutions in which suits by the Attorney General have been dismissed for lack of statutory authority, practices which deny children and adults in institutions of basic constitutional rights are quite wide-spread. It is that perception which led the Department to support legislation which would authorize the Attorney General to initiate suits where they are most needed rather than having to wait until private litigants have brought suits in which we can seek to participate.

REMEDIES FOR ABUSE OF CHILDREN IN INSTITUTIONS

The third area I was asked to address today is that of effective methods for dealing with institutional abuse of children. As a representative of a primarily litigating agency, I would not hold myself out as an expert on this issue. What I can tell you is that, when the Department of Justice represents the interests of the United States in cases dealing with abuse of children in institutions, we investigate to find the facts concerning each institution and employ persons who are experts in the substantive areas to give opinions about what is wrong and what can or should be done about it. We approach the question of remedy on a case-by-case basis, and ask the courts to take the remedial measures which are appropriate to the conditions which it has found to exist.

What I'd like to do, briefly, is to give an overview of the kinds of relief which have been ordered by the courts to address some of the types of abuse which I spoke about earlier.

For instance, courts have enjoined the use of medication as a punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with the residents' functioning. Similarly, limitations have been placed on the use of mechanical restraints so that they are used only when necessary to prevent injury to the individual resident or others or to promote physical functioning, that restraints may be used only upon the order of a qualified professional for a specified time and renewed only by the professional, and that the person in restraints must be checked at regular intervals to prevent harm from occurring.

Institution officials have been ordered to take every precaution to see that the buildings in which persons reside are kept clean and conducive to good health. Wheelchairs must be provided for those residents who require them. The feeding of residents while they are lying flat has been prohibited because of the dangers of aspiration. Medical and other health-related services have been required to be provided, and increased security procedures have been required to protect residents from injury.

In the mental health area, the courts have in some cases concluded that the large, isolated institutions which have been in use since the mid-nineteenth century do not comport with current generally accepted professional standards of care and that persons confined therein should be evaluated on an individual basis for appropriate placement in community-based facilities. Thus, these courts have ordered the phasing out of the institutions and have provided for some of the measures I described above, as interim relief.

In the context of juvenile detention facilities, the courts have prohibited physical abuse of residents; the use of tear gas as a punitive measure; the unlimited use of solitary confinement; forcing children to remain silent for long periods of time and, for those whose mother-tongue is some other language, requiring them to speak only English.

Racial segregation of juveniles has been prohibited.

When juveniles are placed in solitary, courts have required that counselling be provided and that they be visited at least once a day by a case worker or a nurse.

Make-work assignments have been forbidden.

Institutions have been required to screen their employees to eliminate persons who are potentially abusive to children.

These are illustrative of some effective methods of dealing with particular kinds of abuse of children in institutions. As stated earlier, each case must be approached on its own facts.

I would like to leave you with one thougt about the problem which is the subject of these hearings. Children in institutions are peculiarly unable to articulate their rights and to use the courts to redress deprivations of those rights. It is unfortunate that resort to the legal system has been increasingly necessary to secure the basic rights for institutionalized persons to which all citizens are entitled. However, while that forum is needed, I believe that the United States, through the Attorney General, can be an effective advocate for those unable to speak for themselves, and I hope that Congress will enact legislation within the next few months which will provide a firm basis for fulfulling the commitment of the United States to constitutional treatmeut of all institutionalized persons.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., February 14, 1979.

Mr. C. RAYMOND MARVIN,
Washington Counsel, National Association of Attorneys General,
Hall of the States, Washington, D.C.

DEAR MR. MARVIN: Thank you for your letter of January 10, 1979 sharing the Discussion Draft of a proposal to establish a Presidential Commission on the care and treatment of institutionalized persons. I appreciate the spirit of mutual cooperation in which you provide the Department of Justice an opportunity to review the proposal and comment upon it.

On February 9, 1979 Assistant Attorney General Drew S. Days, III, head of the Civil Rights Division, testified before the Senate Judiciary Subcommittee on the Constitution about S. 10, which would authorize the Attorney General to institute lawsuits on behalf of institutionalized persons. At the request of Senator Bayh, Mr. Days commented in his testimony about the Commission proposal. I have enclosed a copy of that testimony for your information.

As Mr. Days stated, the Justice Department does not support the creation of a Presidential Commission to study the issue of the care and treatment of institutionalized persons. We believe such a Commission would be an unnecessary and costly duplication of existing means by which these issues can be evaluated and, to the extent appropriate, made the subject of a coordinated and rationally developed set of national standards and policies.

The Department is fully committed to close consultation with State officials as we work to guarantee the statutory and constitutional right of persons in our health and penal institutions. I believe that S. 10 and H.R. 10 contain valuable legislative provisions that will facilitate this process.

Sincerely yours,

GRIFFIN B. BELL, *Attorney General.*

APPENDIX 3—SUPPLEMENTAL MATERIALS FROM WITNESSES

MENTAL HEALTH AND HUMAN RIGHTS: REPORT OF THE TASK PANEL ON LEGAL AND ETHICAL ISSUES SUBMITTED TO THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, FEBRUARY 15, 1978

MENTAL HEALTH AND HUMAN RIGHTS: REPORT OF THE TASK PANEL ON LEGAL AND ETHICAL ISSUES

Submitted to
The President's Commission on Mental Health
February 15, 1978

The Arizona Law Review *is pleased to publish the report,* Mental Health and Human Rights, *which was submitted to the President's Commission on Mental Health by the Commission's Task Panel on Legal and Ethical Issues. The study, which also appears in an Appendix to the Commission's Report, is printed here in the exact form in which it was submitted to the Commission, with the exception of renumbering all footnotes. Because this report represents a valuable contribution to the literature in the mental health law field, the* Arizona Law Review *hopes to increase the report's accessibility to those involved in that field. The editors believe it to be particularily appropriate to publish the report in the* Review *because Dr. Allan Beigel, of the University's Department of Psychiatry, served as a member of the Commission, and Professor David B. Wexler, of the University's Law College, served as a member of the Task Panel on Legal and Ethical Issues.*

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I. INTRODUCTION AND SUMMARY

The Task Panel on Legal and Ethical Issues represents the full diversity of perspectives and expertise among professionals, policymakers and mentally handicapped persons.[1] Its members include social workers, psychologists, psychiatrists, lawyers, educators, a mental health commissioner, civil servants and recipients of mental health services. Our recommendations and analysis, here presented, are the outcome of an intensive process—from early exploration of the issues through individual position papers and proposals by small working groups—culminating in five days of comprehensive discussion by the full Panel.

The report encompasses legal and ethical issues in education; employment; housing; Federal benefits; confidentiality; guardianship; experimentation; treatment (including the right to treatment and to protection from harm, the right to treatment in the least restrictive setting, the right to refuse treatment and to the regulation of treatment); civil commitment; and the criminal justice system. Other sections discuss the need for advocacy and suggest structures for a patient's or consumer's bill of rights and the resolution of ethical dilemmas.[2]

Given the complexities of these issues and the variety of Panel members' perspectives, we were pleasantly surprised by the extent of consensus as to the directions for action and reform. There is much talk these days of polarization between different disciplines within the professions and of competing philosophies or value preferences even within the advocacy movement itself. Even so, the individual members of the Panel on Legal and Ethical Issues, working closely together and with respect for each other's views, were able to reach agreement on significant reforms in many areas.

In the three sections of this report which follow this introduction and summary, 42 recommendations, some containing many parts, are set forth and each is followed by a discussion and justification. Where consensus was not achieved, alternative approaches and/or simple discussion of the relevant issues are set forth.[3] Appendix A lists all our recommendations in one place, for the reader's convenience. Appendix

1. In this report, the term "mentally handicapped person" is used to include the mentally ill and mentally retarded and other developmentally disabled persons, along with those perceived to have such conditions. The term is used interchangeably with "mentally disabled."

2. Each of the areas covered in this report has both legal and ethical dimensions. Because the initial discussions in Section III are basically rights-oriented, however, an attempt is made in Section V to organize the important ethical issues in basic categories and to provide a preliminary structure for clarifying and resolving ethical conflicts.

3. In the process of reaching consensus, there was much give and take, including compromise by particular Panel members on initial positions. Where consensus was eventually achieved, however, this report sets forth the recommendations agreed upon and gives the rationale for the recommendation without attempting to describe and rationalize other possible positions.

B lists those recommendations relating to research and training initiatives.

The Panel's recommendations cover both specific initiatives that could be taken at the Federal executive or legislative level and others that would have to be taken by State legislators or administrators. While a Federal commission obviously cannot dictate State initiatives affecting civil commitment or guardianship, nevertheless the Panel believes it can make a valuable contribution by providing models of progressive reform for use by the States.

Our discussion suggests both specific actions which could be taken immediately and more general approaches to long-term goals.

Our discussions speak generally to the problems of all mentally ill persons and mentally retarded and other developmentally disabled persons, as well as to the problems of children, the elderly and other racial or cultural "special populations." The reader should bear in mind that there will be a need to adapt particular recommendations to reflect both age-specific differences and the unique needs of particular subgroups.

While many of the recommendations we suggest would cost little if any new money, some do indeed have cost implications. But we believe that our national values and priorities must reflect a commitment to mentally handicapped persons, who are a disadvantaged, vulnerable and often-forgotten group. It would be both self-deceptive and a disservice to the Commission and the President to assume that to fully protect the constitutionally-mandated and other rights of mentally handicapped persons will not require the expenditure of additional funds.

Perhaps the most important point that the Panel wishes to convey to the Commission is the importance of building a strong "patients'-rights" and consumers' perspective into any reforms in the services system. All Panel members recognize the importance of increasing the quality and quantity of mental health services available to the public, especially on a voluntary basis. But the Panel is also keenly aware that even the best-intentioned efforts to deliver services to mentally handicapped persons have historically resulted in well-documented circumstances of exploitation and abuse. As Mr. Justice Brandeis put this perspective so eloquently in his dissenting opinion in *Olmstead v. United States*:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious en-

croachment by men of zeal, well-meaning, but without understanding.[4]

While there is understandable concern about balance and the danger of excesses, the "patients'-rights" or advocacy movement is widely credited with producing the most significant reforms in the mental health system during the past ten years. The Panel hopes that the Commission, in writing its report and making its recommendations, will keep in mind the importance of the advocacy perspective, recognizing that the most well-intentioned efforts to provide services without checks and balances to protect human rights can lead to unfortunate results. In this connection, the Panel anticipates that, as our country moves increasingly from institutional to community-based care, it will be important for advocacy efforts to shift from exposing abuses and deficiencies in institutions to protecting mentally handicapped persons from a wide range of deprivations of basic civil rights and privileges that they too often experience in the community.

In keeping with the Panel's priorities, a discussion of particular initiatives which might be taken to promote legal advocacy on behalf of mentally handicapped persons immediately follows this introduction and summary. It might seem to be putting the cart before the horse to discuss advocacy in Section II before discussing in Section III the substantive content of what should be advocated. However, this organizational framework reflects the Panel's view that legal and ethical claims by the consumers of mental health services will be of little significance unless an advocacy process or structure has been established to ensure that serious, ongoing attention is paid to these important issues.

Quite apart from the specific recommendations and supporting justifications which we have made, the Panel members have become convinced that there is an acute need for continuing discussion among mental health professionals, legal professionals, concerned lay persons and the "consumers" themselves. Our own recent experience demonstrates that such discussion is both possible and productive—that it can lead to better understanding and constructive recommendations among all of the various people concerned with improving the mental health system.

While legal and ethical issues are the focus of this report, our deliberations have clearly shown that there are crucial legal and ethical dimensions to the work of every other task panel established by the President's Commission on Mental Health. For example, the concept of deinstitutionalization cannot be discussed meaningfully apart from a review of the legal and ethical claims for a right to treatment and the

4. 277 U.S. 438, 479 (1928).

principle of "less drastic means" or the "least restrictive alternative." Or, to give another example, it would be irresponsible indeed to consider the subject of prevention without giving due consideration to related legal and ethical issues of due process in testing and placement decisions, of the confidentiality of mental health records or of the ethics of allocating resources between preventive efforts and the delivery of services to those most immediately in need. Therefore, we believe it is important for the Commission, and for those implementing the Commission's final report in the future, to consider the legal and ethical issues which we discuss in relation to the broader themes of prevention, service delivery, research and training, rather than as an isolated subject.

It is the earnest hope of all members of the Panel on Legal and Ethical Issues that our work, as embodied in the recommendations and discussion which follow, will be of value to the Commission in its own deliberations and in the formulation of its final recommendations and be of value as well in the public debate about legal and ethical issues.[5]

II. ADVOCACY

Recommendation 1.

The President's Commission should support legislation which would establish and adequately finance a system of comprehensive advocacy services for mentally handicapped persons.

Commentary:

Advocacy is a broad concept that covers many different kinds of efforts to secure better services for and to protect the rights of (in this instance) mentally handicapped persons. Many mental health professionals and citizen volunteers see themselves quite appropriately as the primary advocates for patients. While all advocacy efforts are valuable, the Panel on Legal and Ethical Issues has focused upon one kind—legal advocacy—which is directed toward establishing and enforcing the legal rights of mentally handicapped persons. Legal advocacy includes both consumer-oriented efforts to improve the quantity and quality of services and civil rights-oriented efforts to protect the liberty and other fundamental rights of mentally handicapped persons.

The need for and significance of legal counsel as a means of ensur-

5. Because of the nature of the topic and the material presented, and because many of the citations are to an extensive variety of cases and other articles, footnotes and references in this report do not conform to the traditional journal style used in other reports of the President's Commission on Mental Health and are placed as notes at the end of each section or subsection of this report for the convenience of the reader.

ing "equal access to justice"[6] is the cornerstone of the American judicial system, extending to matters involving a potential "substantial loss" or "serious legal consequence."[7] Such a need for counsel is, of course, magnified in cases involving mentally handicapped persons, in matters involving both institutionalization and its potential consequences, as well as noninstitutional problems which relate in any way to the person's "deviant status."[8]

In recognition of this need for legal services, several States have established systems to provide counsel to mentally handicapped persons as a means of ensuring that there is "someone on the 'outside' who is concerned about [a patient's] . . . fate".[9] Additionally, Congress had enacted Federal legislation—the Developmentally Disabled Assistance and Bill of Rights Act[10]—requiring that, in order to be eligible to receive funds under the Act, a State must provide "a system to protect and advocate the rights of persons with developmental disabilities," with the specific "authority to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of such persons" and a mechanism specifically established so that a developmentally disabled person "has the means to reach outside of the established delivery system for examinations of situations in which his rights as an individual citizen may have been violated."[11]

Also, Congressional legislation has been introduced to create a National Mental Health and Disability Advocacy Services Office.[12] The bill, modeled after the New Jersey advocacy program, would mandate the provision of legal counsel and professionally trained advocates in individual and class matters for indigent patients as well as residents

6. Herr, *Advocacy Under the Developmental Disabilities Act* 88 (1976).

7. See, for example, *Powell v. Alabama*, 287 *U.S.* 45 (1932); *Gideon v. Wainwright*, 372 *U.S.* 335 (1963); *Argersinger v. Hamlin*, 407 *U.S.* 25 (1972); *Cleaver v. Wilcox*, 499 *F.* 2d 940, 945 (9 Cir. 1974); *Crist v. N.J. Div. Youth and Family Services*, 128 *N.J. Super.* 402, 414, 320 *A.* 2d 203 (Law Div. 1974), aff'd in part, rev'd in part on other grounds, 135 *N.J. Super.* 573, 576, 343 *A.* 2d 815 (App. Div. 1975).

8. See, respectively, *Dale v. Hahn*, 440 *F.* 2d 663, 668 (2 Cir. 1971) and Friedman, *The Rights of Mentally Retarded Persons* 150 (1976); *Lynch v. Baxley*, 386 *F. Supp.* 378, 389 n.5 (M.D. Ala. 1974); and Cohen, "Advocacy," in Kindred *et als*, eds., *The Mentally Retarded Citizen and the Law*, 592, 614 (1976), and Herr, above, at 5.

9. Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 *Calif. L. Rev.* 840, 890 (1974).

See also *N.J.S.A.* 52:27E-21 *et seq.* (the Division of Mental Health Advocacy within the New Jersey Department of the Public Advocate) (discussed at length in Perlin and Siggers, "The Role of the Lawyer in Mental Health Advocacy," 4 *Bull. Am. Acad. Psych. & L.* 204 (1976); *N.Y. Mental Hygiene Law* § 29.09 *et seq.* (the New York Mental Health Information Service); and *O.R.C.A.* § 5119.85 *et seq.* (the Ohio Legal Rights Service for the Mentally Retarded).

10. 42 *U.S.C.* § 6001 *et seq.*, and, especially, 42 *U.S.C.* § 6012.

11. Herr, above, at 11, quoting Sen. Rept. 94-160, at p. 38 (describing the system created by 42 *U.S.C.* § 6012).

12. H.R. 10827, 94th Cong., 1st Sess. The bill has not been reintroduced in the 95th Congress because its sponsor, Rep. James J. Florio (D.-N.J.), intends to offer it as an amendment to the bill which would extend the authorization for the Community Mental Health Centers program (H.R. 10553, 95th Congress, 2d Session).

of facilities for the retarded, participants in community mental health programs and persons in geriatric facilities, in matters involving admission to and release from such facilities as well as in matters relating to residents' treatment and conditions while institutionalized.

Finally, legal services offices in States such as Minnesota, Washington and Vermont have established high-quality special advocacy projects with outside sources of Federal money. This legal services-delivery model might be expanded.

The Panel suggests that the Commission endorse a Federal mechanism or, in the alternative, urge States to develop advocacy systems which are (1) able to respond to the legal needs of mentally disabled persons and (2) independent of providers of mental health and developmental disability services. An essential feature of such advocacy systems should be their effort to provide a continuity of legal services to such persons at all stages of their contact with the mental disability system. Such advocacy systems should provide services at involuntary-commitment proceedings and to institutionalized persons of all ages as well as to community residents in matters involving institutionalization (commitment, release, treatment issues) and the fact of present or former institutionalization (availability of economic benefits, aftercare, denial of civil rights, employment, education issues) and in other matters related to the existence—or perceived existence—of a handicap (domestic relations, contracts, wills, tenancy issues). In addition to attorneys (an "indispensable element in seeking and securing many types of remedies"),[13] the advocacy system should be staffed by persons trained as "mental health professionals" *(e.g.*, social workers and psychologists who provide advocacy services), lay advocates, present and former recipients of mental health services, so as to provide a full-time staff with the necessary academic training and practical experience to provide full advocacy services for its clientele.[14]

The effect of an organized, specialized counsel system is clear. Counsel plays a critical and, in some cases, nearly dispositive role in involuntary commitment proceedings—where active attorneys are employed, fewer persons are committed.[15]

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13. Herr, above, at 12.

14. See, for example, Nat'l. Ass'n. for Retarded Children, *Citizen Advocacy for Mentally Retarded Children: An Introduction* (1974); Chamberlin, Testimony Prepared for the President's Commission on Mental Health (Nashville, Tenn., May 25, 1977), at 4; Perlin and Siggers, 4 *Bull. Am. Acad. Psych. & L.*, above, at 206-207; Note, "The Department of the Public Advocate—Public Interest Representation and Administrative Oversight," 30 *Rutgers L. Rev.* 386, 416-417 (1977).

15. "Developments in the Law—Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190, 1285 (1974).

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Two clear conclusions may be drawn from statistical surveys: a large percentage of State hospital patients can be safely treated elsewhere (the number varying from 43 percent to 68 percent to 75 percent), and, where counsel is operative, the number of committed persons plummets, especially when compared with persons not represented by counsel.[16]

Advocacy services should be available on both an individual and class-action basis. Although the impact of class representation is often profound, concentration *solely* on class aspects of a matter runs the danger of "sacrific[ing] the good of the individual to the welfare of the group."[17] Furthermore, the vast majority of cases involving commitment or release from institutions will involve individual fact-determinations. The ability to handle both types of cases will give the advocacy system the ability to deal with the "forest" as well as the "trees."

Provision of legal advocacy services cannot be limited to court appearances; it must extend to the full panoply of legal activities, including counseling, drafting, lobbying and negotiating, in a manner which takes into basic consideration at every step the *actual* views and wishes of the patient/client, which may not always coincide with recommendations made by others. The Panel supports expanded legal advocacy services which would be available to all mentally handicapped persons (from children to the elderly), including free legal advocacy services for indigent persons, but does not express an opinion on whether a means test should be invoked.

Rights cannot be enforced if patients or clients do not know of their existence. The Panel therefore believes that there must be mechanisms to inform patients or clients about their rights, about the availability of advocacy and about how to use it—for example, by requiring that the names and telephone numbers of available advocates be posted in locations frequented by clients. For further discussion of this issue, see Section IV.1., "Bills of Rights," Recommendation 2, page 138, below.

16. See, for example, Scheff, *Being Mentally Ill* 168 (7th ed. 1973) (the presence of 43 percent of patients in hospitals studied could not be explained in terms of their psychiatric condition); Abraham and Bueker, "Preliminary Findings from the Psychiatric Inventory" 3 (1971) (68 percent of patient population at St. Elizabeths Hospital in Washington not considered dangerous to themselves or others), and Mendel, "Brief Hospitalization Techniques," 6 *Current Psychiatric Therapies* 310 (1966) (75 percent of patients with diagnosis of schizophrenia studied could be suitably discharged), as cited in Ferleger, "A Patients' Rights Organization: Advocacy and Collective Action by and for Inmates of Mental Institutions," 8 *Clearinghouse Rev.* 587, n.1 (1975).

17. Boggs, "Collective Advocacy (Systems Advocacy) vs. Individual Advocacy," (paper prepared for presentation at the Conference on Developmental Disabilities, Advocacy and Protective Services, Washington, D.C., October 13, 1976), at 2.

Recommendation 2.

The protection and advocacy (P&A) systems established in each State under the Developmentally Disabled Assistance and Bill of Rights Act as of October 1977 should be carefully evaluated and this approach to advocacy services should be supported if it proves effective. If it does, mentally ill persons should either be brought within the jurisdiction of the "P&A" systems or else a parallel system which will represent mentally ill persons should be established.

Commentary:

The Developmentally Disabled Assistance and Bill of Rights Act has established a protection and advocacy system, not limited to legal advocacy and independent of service providers, in each State. Given the newness of this system, the Panel is unable to make any specific recommendations concerning continuation or modifications of this program, except to recommend careful evaluation and follow-up. However, one striking fact was of concern to the Panel: At present we have a nationwide system of advocacy for developmentally disabled persons, supported with Federal funds, but no similar provision has been made for advocacy on behalf of mentally ill persons. This deficiency is unfortunate and should be remedied as promptly as possible.

This recommendation is made not as an alternate but as a complement to our first advocacy recommendation. Given the small amount of money allocated and the limitations of the system, the "P&A" system should in no sense be viewed as a panacea.

Recommendation 3.

The President's Commission should support efforts by which currently existing legal aid, legal services and public defender programs and the private bar at large can more adequately represent mentally handicapped persons at every stage at which such persons have contact with the mental disability system. These efforts should be directed at providing a continuity of legal care and should include, but not be limited to, the following:

(a) Recommending to the Legal Services Corporation that it establish a national support center to assist local offices in representation of mentally handicapped persons, and that it run special training programs so that members of local offices can effectively and adequately represent mentally handicapped persons.

(b) Endorsing legislation which would give the United States Department of Justice standing to litigate on behalf

of mentally handicapped persons whose civil and/or constitutional rights have been violated.

(c) Endorsing legislation which would mandate the Law Enforcement Assistance Administration of the Department of Justice to provide economic, staff and training support to state and local public defender and prisoners' rights programs so as to provide more effective and adequate representation for mentally handicapped persons who have been criminally charged and/or who are incarcerated in jail or prison facilities.

(d) Endorsing state legislation which would ensure that the jurisdiction of public defender programs established pursuant to state statute specifically includes representation of persons in matters involving determinations of competency to stand trial and of criminal responsibility, as well as matters involving transfers of persons from criminal detention and incarceration facilities to psychiatric hospitals or similar facilities.

(e) Recommending to local and state bar associations that they train members of the private bar and establish lawyer-referral panels so as to more effectively and adequately represent mentally handicapped persons.

Commentary:

Although it is clear that the creation of a unified, specialized, trained advocacy-service mechanism in all states and communities must be a top priority, there are other steps that can and should be taken before such a program is created. Expanding the capabilities of existing legal aid and defender programs (as well as the private bar) in representation of handicapped clients would at least partially fill current gaps in service delivery, would sensitize thousands of practicing lawyers to problems faced regularly by handicapped persons and would create specialist advocates who could effectively represent a handicapped clientele.

a. Legal Services Corporation:

As noted above, special Legal Services offices, with outside sources of funding, have provided top-quality legal representation to mentally handicapped persons in a few states. Such projects should be recognized and encouraged. Other Legal Services systems, however, have done little to represent mentally handicapped persons, not only because of their limited funding in the face of competing demands

upon lawyers' time but also because the lawyers lack special expertise in mental health law issues and in how to communicate and work comfortably with mentally disabled persons. Existing legal services support centers provide special skills, technical assistance, training and legal expertise in subject matters such as welfare, employment, senior citizens' rights, health law and juvenile law. Attorneys from these centers have been instrumental both in winning landmark cases affecting thousands of citizens and in heightening understanding by the courts, by other legal services lawyers and by the general public of the particular problems facing their discrete client constituencies.

The problems of the mentally handicapped, like the problems of the unemployed, the elderly, welfare recipients, and the young, need the additional resources of a national-level support center. The Legal Services Corporation should build such a national center into its own network, perhaps by contracting with an existing project which already has an experienced and qualified staff. The President's Commission should make such a recommendation to the Legal Services Corporation.

While the mentally handicapped are faced with special problems, some of their problems are parallel to or even the same as those for which legal services offices already provide services to other groups—e.g., access to social-welfare programs and entitlements. Lawyers need to see the mentally handicapped as part of their regular clientele, and also to learn how to handle the special legal problems they have and the special problems they may present as clients. A national support center would help sensitize Legal Services lawyers to these special problems and train them to provide solutions.

It is clear, however, that such nationally based centers are not a palliative for all the problems faced by an underrepresented group; they are simply necessary so that lawyers in local legal aid and legal services offices may be trained in both the substance of "mental health law" and in the process and techniques of representing and counseling mentally handicapped persons on the whole range of legal issues which affect them.

b. Justice Department Standing to Sue:

Proposed Federal legislation[18] supported by the Administration would authorize the United States Department of Justice to intervene in or initiate civil actions when there is a pattern or practice of violations of the Federal constitutional and/or statutory rights of individu-

18. H.R. 9400, 95th Congress, introduced by Rep. Robert W. Kastenmeier (D.-Wis.) and S. 1393, 95th Congress, introduced by Sen. Birch Bayh, (D.-Ind.).

als incarcerated or institutionalized in State facilities. This bill would greatly increase the likelihood of ameliorating unconstitutional and illegal practices and conditions in State institutions by providing to those persons who are least able to represent themselves a mechanism whereby their fundamental grievances can be addressed. The continuity of expertise and resources provided by the Department of Justice is an essential underpinning for the maintenance of responsible and high quality litigation.

c. LEAA Support:

As underserved and underrepresented as most mentally handicapped persons are, it is likely that those charged with criminal activity and those either detained awaiting trial or incarcerated following conviction are even more underserved and underrepresented than other mentally handicapped persons.[19] One corollary of this underrepresentation is that mentally handicapped persons accused or convicted of crime are often processed with little consideration for the specific legal and ethical issues which may have an impact upon their status.[20] The rights and special-service needs of mentally handicapped juveniles who come before the courts as status offenders or juvenile delinquents are often equally ignored. These youths are either shunted back and forth from juvenile correctional facilities to facilities for the mentally retarded or mentally ill, or are dumped with all the other juvenile offenders. Neither advocates nor funds have been available to define their rights or to seek appropriate services for them.

The Law Enforcement Assistance Administration (LEAA) has the capability of providing staff and training support to local public defender offices and to legal aid programs representing convicted and detained persons on matters of prisoners' rights.[21] The President's Commission should support legislation which would require the LEAA to devote a percentage of its time and resources to the training of local defender programs so as to enable attorneys working for such programs to represent mentally handicapped persons effectively and adequately. Further, the President's Commission should recommend that the Office of Juvenile Justice and Delinquency Prevention in LEAA target a proportion of its funds and resources toward the problem of the mentally handicapped juvenile offender.

19. See for example, Note, "The Accused Retardate," 4 *Colum. Human Rts. L. Rev.* 239 (1972).

20. See, for example, *United States v. Masthers*, 539 *F.*2d 721 (D.C. Cir. 1976); Perlin, "Psychiatric Testimony in a Criminal Setting," 3 *Bull. Am. Acad. Psych. & L.* 143 (1975).

21. See, for example, 42 *U.S.C.* § 3731(b)(10); 42 U.S.C. § 3737.

d. Public Defender Jurisdiction:

Although most States have established some sort of public defender programs in the wake of *Gideon v. Wainwright*,[22] few appear to make provision for the special problems endemic to representation of persons charged with criminal offenses when there are questions raised as to a defendant's competence to stand trial or as to his responsibility for the criminal act in question.[23] Although clients are represented, there does not appear to be any law-reform office, legal services office or public defender office created especially to provide expertise in these areas.

A problem perhaps even more pressing is the ultimate fate of persons found "not guilty by reason of insanity," of whom it has been accurately said, "No [other] group has been more deprived of treatment, discriminated against, or mistreated."[24] Once persons in this category are transferred to hospitals for the "criminally insane," it is most likely that any representation has long ceased.

The President's Commission should endorse legislation on a state level which would amend those statutes establishing jurisdiction of public defender offices to specify that such offices should represent persons in all matters involving determinations of competency to stand trial, criminal responsibility and transfer of such persons to and from psychiatric facilities, whether such transfers be pursuant to court order or to administrative directive.

e. Private Bar Initiatives:

Whether or not any or all of the above recommendations are enacted, it is still an inescapable fact that members of the private bar will continue to come into contact with mentally handicapped persons with whom they often have great trouble in dealing. The private practitioner will still—on an occasional basis—represent (or file suit against or defend against) handicapped persons in actions involving estates, negligence, contracts, divorces, custody and zoning, to skim the surface; it is likely that s/he will similarly require training in the specialized process of representing (or opposing) handicapped persons in litigation.

While bar activation efforts of the American Bar Association's Commission on the Mentally Disabled have begun to address this problem, more and greater resources and efforts are necessary. There-

22. 372 *U.S.* 335 (1963).

23. See, respectively, *Drope v. Missouri*, 420 *U.S.* 162 (1975) and American Law Institute, *Model Penal Code*, § 4.01.

24. German and Singer, "Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity," 29 *Rutgers L. Rev.* 1011, 1074 (1976).

fore the President's Commission should recommend, through the American Bar Association, to local and state bar associations that they train and establish referral panels of their member lawyers to more adequately and effectively represent mentally handicapped persons.

III. Recommendations in Specific Rights Areas

1. *Education*

Recommendation 1.

The Department of Health, Education, and Welfare should vigorously implement and enforce the requirements of the Education of All Handicapped Children Act, P.L. 94-142, (20 U.S.C. §1401 et seq.) and the new regulations implementing section 504 of the Rehabilitation Act (45 C.F.R. Part 84). A program of financial assistance, similar to the Emergency School Aid Act, should be initiated to help school districts with the costs of compliance. The funds for such a program could be drawn from other education programs that have outlived their usefulness such as Emergency School Aid and the Impact Aid program.

Commentary:

As recognized in the historic Supreme Court decision of *Brown v. Board of Education*,[25] educational opportunity is the primary vehicle for social and economic advancement in our society. Without access to education, other rights—such as freedom of speech and the right peaceably to assemble and to petition the government—are diminished, perhaps entirely nullified. Historically, however, mentally handicapped children have been excluded from receiving a free appropriate public education either on the grounds that the school system lacks the capacity to deliver needed educational services or because the mentally handicapped child is labeled as a disciplinary problem and expelled.

Leading court cases such as *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*,[26] and *Mills v. Board of Education*[27] have established that systematic exclusion of mentally handicapped children from schools violates the equal protection and due process clauses of the Constitution and have prescribed procedural protections to ensure appropriate classification and placement of mentally handicapped children. The best features of these court cases have

25. 347 *U.S.* 483 (1954).

26. 334 *F. Supp.* 1257 (E.D. Pa. 1971); 343 *F. Supp.* 279 (E.D. Pa. 1972).

27. 348 *F. Supp.* 866 (D.D.C. 1972). See also *Frederick L. v. Thomas*, 408 *F. Supp.* 832 (E.D. Pa. 1976); *Fialkowski v. Shapp*, 405 *F. Supp.* 946 (E.D. Pa. 1975); but see *Cuyahoga County Assoc. for Retarded Children and Adults v. Essex*, 411 *F. Supp.* 46 (N.D. Ohio 1976).

been incorporated into the Education of All Handicapped Children Act[28] and the new regulations[29] implementing section 504 of the Rehabilitation Act.[30] In the Panel's view, these laws represent a major step forward in vindication of the rights of mentally handicapped children, and all possible emphasis and assistance should be given to implementation of this new Federal legislation. A concrete suggestion is that a program of financial assistance similar to the Emergency School Aid Act[31] be initiated to help school districts with the cost of complying with these important requirements. Such assistance, which would be awarded to districts that demonstrate their intention to comply with Federal standards, could be used to meet the cost of additional staff (e.g., teachers, physical therapists, psychologists) and expenses of eliminating architectural barriers and installing needed special equipment. The Education of All Handicapped Children Act already authorizes grants for this latter purpose,[32] and other bills are currently pending in Congress which would help to one degree or another in financing section 504 compliance.[33]

Recommendation 2.

> *As part of their right to education, mentally handicapped individuals should be provided with compensatory education services beyond ordinary age limits, where past deprivation of education makes this necessary.*

Commentary:

Experts agree that early identification and treatment of handicapped children is vital to such children's educational success and that many mentally disabled individuals can continue to benefit from education after the age of 21. Indeed, the argument can be made that some mentally handicapped persons are entitled to *extra* years of education if their learning opportunity is to be equalized with that of "normal students." Every effort should therefore be made to expand the education of handicapped students beyond the ages (typically 6 to 21) for which it is now legally mandated. At a minimum, mentally handicapped adults who were denied their right to education as children should be provided with compensatory educational services beyond the ordinary upper age limits for public education, under the same principle which has supported compensatory education for minority students

28. 20 *U.S.C.* 1401 *et seq.*, as amended by Public Law 94-142.
29. 45 C.F.R. Part 84, 42 F.R. 22675 (May 4, 1977).
30. 29 *U.S.C.* 794.
31. 20 *U.S.C.* 1601 *et seq.*
32. 20 *U.S.C.* 1406.
33. S. 2302, H.R. 7626, H.R. 10071, H.R. 10010.

who have been forced to attend inferior, segregated school systems.[34]

Recommendation 3.

> *Institutionalized mentally disabled children must also be provided with an appropriate education, in a community setting wherever possible, as the Education for All Handicapped Children Act of 1974 requires. Surrogate parents, not drawn from institutional staff, must be appointed to protect the rights of such children when the natural parents are unavailable.*

Commentary:

The Panel recommends that, whenever possible, mentally handicapped children now residing in institutions be provided with appropriate education in the community, in order to normalize their lives and to reduce stigma. This recommendation includes not only children in mental hospitals and State schools for the mentally retarded, but also mentally handicapped children who may be placed—properly or not—in various correctional or juvenile facilities. The considerations—legitimate or not—which lead to institutionalization of children—often have nothing to do with educational needs, and should not be allowed to interfere with such children's right to an appropriate education in the least restrictive and most normal setting feasible.[35]

Particular attention must be paid to ensuring that children in State custody have access to appropriate representation and that they and their advocates are fully informed of their education rights and of procedures for protecting these rights.[36] It is estimated that as many as 750,000 children live in foster homes or in group residential settings at State expense and under State auspices.[37] Without special efforts, it is likely that little attention will be directed to ensuring these children—many of whom are mentally handicapped—the appropriate education to which they are legally entitled.

Recommendation 4.

> *Colleges and universities must be encouraged and assisted to train teachers and other education personnel in methodologies appropriate for instruction of severely handicapped individuals and for management of handicapped students in a regular classroom setting.*

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34. See *Milliken v. Bradley*, 97 S. Ct. 2749 (1977).

35. 20 *U.S.C.* 1412(5)(B); 45 C.F.R. § 121a.550 *et seq.*, 42 C.F.R. 42473, 42497-42498 (August 23, 1977); 45 C.F.R. § 84.34.

36. 20 *U.S.C.* 1415(b)(1)(B), 45 C.F.R. § 121a.514.

37. Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out of Home Care (An Overview)*, at 3 (Washington, D.C. 1977).

Commentary:

New Federal and State legislation, with its emphasis on "mainstreaming" and on provision of services to severely disabled children,[38] requires increased emphasis by teacher-training institutions on preparation in techniques for education of handicapped students. "Mainstreaming" does not mean that all children, regardless of the nature or severity of their handicaps, must immediately be assigned to regular classroom situations; it does require that all teachers—not just those certified or concentrating in special education—be prepared to deal in a normal classroom setting with children who exhibit various types and degrees of handicapping conditions. Moreover, the mandate to educate *all* handicapped children requires a revision of traditional notions of what constitutes a program of education, or even of special education. For the most disabled individuals, education may consist of inculcation of basic self-help, social or behavioral skills, or remediation of severe emotional problems, before academic or pre-academic instruction in the usual sense can be considered. Because many teachers now certified in "special education" are not equipped to provide this type of service, they themselves must receive necessary training.

Recommendation 5.

> *States must be encouraged, assisted and required, if necessary, to provide training for parents, guardians, surrogate parents and lay advocates in the use of special education due process procedures, as well as for the hearing officers designated to conduct due process hearings. HEW should collect and analyze the transcripts and records of a representative sample of such hearings and take appropriate action to ensure that educational placement decisions are made after full and fair consideration of all relevant factors, including the views of those representing the interests of the student.*

Commentary:

The due process in educational placement guaranteed by the Education of All Handicapped Children Act[39] and the section 504 regulations[40] can be a cruel illusion unless parents and advocates are trained to utilize the prescribed procedures and unless State or local hearing officers are equipped to conduct due process proceedings in a judicious

38. 20 *U.S.C.* 1412(3), 1412(5)(B); 45 C.F.R. §§ 121a.320 *et seq.*, 121a.550 *et seq.*, 45 C.F.R. § 84.34.
39. 20 *U.S.C.* 1415, 45 C.F.R. § 121a.500 *et seq.*
40. 45 C.F.R. § 84.36.

and compassionate manner and to render truly impartial decisions based on an understanding of both legal and educational requirements.

Training of parents and advocates is particularly important because experienced and concerned lawyers are simply not likely to be available in sufficient number to represent all the children whose placements come into question. There is no apparent reason why lay persons—with proper advocacy training—cannot function as effectively as lawyers, at least in the administrative stages of due process proceedings which do not present novel legal issues, and any State statutory or regulatory impediments to such participation should be removed. (The effectiveness of lay representation and the need, if any, for increased legal assistance should also be carefully monitored.)

Additionally, early experience under recent Federal[41] and State special-education laws indicates that prescribed procedures may not be consistently observed and that hearing officers, lacking a clear definition of their role or of the standards they must apply, may be inclined to give undue deference to or resolve all doubts in favor of the views of State and local school officials. At least in connection with its review of annual State plans under the Education for All Handicapped Children Act, HEW should closely monitor the hearing process in order to determine whether proper procedures are being followed and plenary review afforded and whether the views of parents, advocates and students themselves are fully and fairly considered.

2. *Employment*

Recommendation 1.

The Task Panel endorses the efforts of the Department of Labor to enforce section 503 of the Rehabilitation Act and encourages voluntary compliance with both 503 and 504 by private employers who are not regulated by these sections.

Commentary:

Because of the stigma which attaches once someone is labeled mentally ill it is commonly difficult if not impossible for patients and former patients to find employment. Sections 503 and 504,[42] Title V of the Rehabilitation Act of 1973, were designed to protect individuals with mental and physical handicaps from this discrimination. Section 504, enforced by program or funding agencies, prohibits discrimination against handicapped persons in any federally funded program or activity. Section 503, administered by the Department of Labor, requires all

41. See, e.g., the "Education Amendments of 1974," Pub. L. 93-380, 88 Stat. 484 *et seq.*
42. 29 *U.S.C.* 793 and 794, respectively.

Federal contractors with government contracts over $2,500 to take affirmative action to hire and advance qualified handicapped individuals.

Section 503 requires outreach, positive recruitment measures and a good-faith effort on the part of employers with job vacancies to notify handicapped individuals and give them a fair opportunity to fill any vacancy. While section 504 does not require the same affirmative efforts, it does require a self-evaluation to be conducted by employers in consultation with interested persons, including handicapped individuals and the groups that represent them. Recipient employers are required to take appropriate steps to eliminate the effects of any discrimination; if HEW finds that any employer has discriminated, it may order remedial action to be taken. Both sections explicitly provide for notice to handicapped people of nondiscrimination.

Sections 503 and 504 also provide protections in the area of preemployment inquiries. Because of the effects of stigma on employers' preconceived notions, section 504 prohibits questions concerning the nature and severity of a handicap (see also dicussion of confidentiality); employers may only inquire as to specific abilities and talents. Section 503 requires employers to review all physical and mental job requirements; those requirements which tend to screen out handicapped individuals must be proven by the employer to be "job related" and consistent with "business necessity and the safe performance of the job." Each section mandates that any medical information received be kept confidential, with some limited exceptions. Finally, both sections prohibit discrimination in terms of rights, benefits and privileges such as leave time and rate of pay, and require that reasonable accommodations be made for handicapped individuals.

These sections govern only those programs and activities receiving Federal funds, in the case of section 504, and, in the case of section 503, Federal contractors with contracts over $2,500. While compliance by such employers represents an obvious advance for mentally handicapped individuals, the Panel believes that it is essential that *all* employers comply with these laws on a voluntary basis.

Moreover, because a law without effective enforcement may not cause fundamental changes for the mentally handicapped person seeking employment, enforcement procedures with "teeth" should be given to the Office of Civil Rights to insure that appropriate leverage is accessible to carry out Congress' intent.

Recommendation 2.

> *Title VII of the Civil Rights Act of 1964 should be amended to prohibit discrimination on the basis of handicap.*

Commentary:

Title VII[43] now prohibits employment discrimination on the basis of race, color, sex, religion and national origin. This statute should be amended to cover, in addition, discrimination on the basis of mental handicaps and physical handicaps, which are often associated with some type of mental disability. Such amendments would eliminate the often troublesome constitutional arguments which now must be made on behalf of handicapped individuals in litigation against public employers. They would also provide a generally applicable legal basis for eliminating discrimination against handicapped persons in the private sector. The legal protections thus created would be especially beneficial as the locus of treatment and services for mentally disabled persons shifts from large institutions to the community.

At least two pending bills[44] would amend Title VII as recommended above. The Administration should support these or similar proposals.

Recommendation 3.

State minimum wage and civil rights laws should be amended to prohibit discrimination against the handicapped.

Commentary:

Amendment of State laws would clarify the rights of handicapped individuals and provide them with further protections against discrimination in the private sector.

Recommendation 4.

Congress should be requested to condition revenue sharing upon an agreement by State governments that mentally handicapped persons who, as employees, perform work of consequential economic benefit to the States shall be paid either the minimum wage or else wages which are commensurate with those paid nonhandicapped workers in the same vicinity for essentially the same type, quality and quantity of work, whichever is higher. States should be required, as a condition of revenue sharing, to agree to the same principles as are currently embodied in 29 CFR Part 529.

In the alternative, the provisions of 29 CFR Part 529 should be incorporated in their entirety into HEW regulations 45 CFR Part 84, subpart B (employment practices) implementing Section 504 of the Rehabilitation Act of 1973.

43. 42 *U.S.C.* 2000e *et seq.*
44. H.R. 3504, S. 1346.

Commentary:

"Institutional peonage" describes the formerly widespread practice of employing residents in institutions for the mentally handicapped to perform productive labor associated with the maintenance of the institutions, without adequate compensation.[45] A 1972 study of 154 institutions in 47 States, which represented 76 percent of existing public facilities for the mentally handicapped, found that 32,180 of 150,000 residents were participating in work programs. Thirty percent were receiving no payment at all and an additional 50 percent were receiving less than $10 per week.[46]

In many State institutions, cleaning, laundering, kitchen work, waiting tables and preparing food, maintenance housekeeping and care of other residents have traditionally been performed in large measure by working residents. In exchange for this labor, working residents may be given open-ward privileges or some other "symbolic" reward; they are virtually never paid the prevailing wage. Institutional peonage exists in part because, given their understaffing and underfinancing, our public institutions cannot afford to pay regular employees for the work which is necessary to run them.

Exploitative motives aside, such nonremunerated work has traditionally been allowed because of difficulties in distinguishing between work which is primarily for the benefit of the institution and work which is chiefly for the benefit of the resident. Uncompensated labor injures resident-workers in a number of ways beyond the obvious loss of income. They are denied work-related benefits such as workmen's compensation and State retirement plans. They are denied the therapeutic benefits of appropriate monetary rewards. Perhaps most significantly, working residents who are not paid for their labor often perceive themselves to be exploited or enslaved and thereby lose a basic sense of self-respect and dignity which is both their right as human beings and a vital element of any meaningful habilitation or rehabilitation program.

Most institutions for the mentally handicapped would maintain that they do not force their residents to work. But, as is widely recognized, there are many pressures in institutions which coerce residents to perform institution-maintaining work and to conform to other institu-

45. See generally Friedman, "The Mentally Handicapped Citizen and Institutional Labor," 87 *Harv. L. Rev.* 567 (1975). "Institutional peonage" is to be distinguished from vocational-training tasks not involving the operation or maintenance of the institution and from personal-housekeeping tasks, such as the making of one's own bed.

46. J. Richardson, *A Survey of the Present Status of Vocational Training in State-Supported Institutions for the Mentally Retarded* 4, 11-12, July 18, 1974 (written for Dr. I. Ignacy Goldberg, Columbia University Teachers College).

tional norms. A resident's refusal to work often results in staff antagonism, restriction of ground privileges or increased medication. It is common for the resident to be labeled uncooperative—with bad effects on his efforts to be released—when he fails to participate in a "voluntary" work program.

A major step in the abolition of institutional peonage was the decision of the United States District Court for the District of Columbia in *Souder* v. *Brennan*.[47] This ruling stated that the 1966 Amendments to the Fair Labor Standards Act extending the minimum wage and overtime provisions to all employees of "hospitals, institutions, and schools for the mentally handicapped" applied to resident workers. The *Souder* court also held that the United States Department of Labor must undertake reasonable enforcement activity on behalf of resident-workers. Addressing the Department of Labor's defense that it is very difficult to distinguish between work and vocational training, the court in *Souder* v. *Brennan* noted,

> Economic reality is the test of employment and the reality is that many of the patient-workers perform work for which they are in no way handicapped and from which the institution derives full economic benefit. So long as the institution derives any consequential economic benefit the economic reality test would indicate an employment relationship rather than mere therapeutic exercise.[48]

Final regulations concerning "employment of patient-workers in hospitals and institutions at sub-minimum wages" were published on February 7, 1975.[49] These regulations, covering employment of patients whose earning or productive capacity is impaired, allow employers to pay such workers a pro rata share of the full minimum wage adjusted to the actual productivity of the handicapped worker relative to that of a "regular" employee.

The United States Supreme Court's decision in *National League of Cities* v. *Usery*[50] appears to limit significantly the reach of the *Souder* decision. In *National League of Cities*, a consortium of States successfully argued that the Federal government's attempt to regulate the minimum wage in State-operated facilities was an unconstitutional intrusion upon State sovereignty. Therefore mentally handicapped workers in State-run facilities, just like their nonhandicapped co-workers, are arguably no longer guaranteed a Federal minimum wage, although they are still entitled to the State minimum wage. However, because *National League of Cities* pertains only to State employees, the Fair

47. 367 *F. Supp.* 808 (D.D.C. 1973).
48. *Id.* at 813 (footnotes omitted).
49. 29 C.F.R. §§ 529.1-17.
50. 426 U.S. 833, 44 U.S.L.W. 4974 (June 24, 1976).

Labor Standards Act and the *Souder* decision still apply to mentally handicapped residents working in private facilities.[51]

The incorporation of the regulations currently codified at 29 CFR section 529 either into revenue sharing agreements with the States or into the employment discrimination regulations under the Rehabilitation Act of 1973 would restore the protection of the minimum wage and the principle of commensurate pay for commensurate work to the full class of mentally handicapped workers.

3. *Housing Within the Community*

Recommendation 1.

(a) *State zoning laws should be enacted which preempt local zoning ordinances and permit small group homes for the mentally handicapped to be considered as permitted "single family residential uses of property."*

(b) *States revising their zoning laws to avoid discrimination against mentally handicapped persons should be alert to the problem of restrictive building codes and/or mutual private restrictive covenants which would undermine the goal of reform.*

(c) *State zoning laws should also prohibit the excessive concentration of group homes in any single neighborhood or municipality within a State.*

Commentary:

Various factors—including the use of psychoactive medication, cost-saving concerns, legal challenges to conditions in institutions and a philosophy of community treatment and "normalization"—have caused increasing numbers of mentally handicapped persons to be released from State hospitals to live in the community. While many of these individuals are capable of independent living, some others need the mutual support and assistance of group living arrangements.

51. The Decision in *National League* only clearly applies to "integral functions . . . in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 96 Sup. Ct. at 4479. The court specifically noted that its holding left intact two earlier cases *Pardon v. Terminal R. Co.*, 377 U.S. 184 (1964) and *California v. Taylor*, 353 U.S. 553 (1957) both of which held that State employees performing nongovernmental functions, such as operating a State-owned railroad, are covered by the FLSA. Consequently, mentally handicapped residents in State institutions have argued that they are still within the minimum wage coverage of the FLSA. See, *e.g., Schindenwolf v. Klein*, Docket No. L-41293-75 P.W. (N.J. Sup. Ct. Law Div., Mercer Cty. 1976) reported at 10 Clearinghouse Rev. 393 (1976); 11 Clearinghouse Rev. 505 (1977). Moreover, the *Souder* Court's ruling that patient-workers in State institutions should be considered "employees" within the Federal act arguably should be given binding effect in determining applicability of State minimum wage laws. See generally Perlin, "The Right of Voluntary Compensated, Therapeutic Work as Part of the Right to Treatment: A New Theory in the Aftermath of *Souder*," 7 *Seton Hall L. Rev.* 298 (1976).

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Experience within the past five years indicates that the development of group residences for the mentally handicapped is often vigorously opposed by members of the communities in which the group homes are to be located. These opponents frequently rely on local zoning ordinances as the principal method for preventing the opening of a group home.

Because there are few standardized zoning laws or models that encourage or even countenance the development of appropriate kinds of community residential facilities for mentally handicapped persons, zoning ordinances tend to be exploited by those opposed to the establishment of community facilities, and in many cases this tactic has proven successful in blocking their development.

Zoning litigation has been employed by both opponents and proponents of group homes, with mixed results.[52] However, as a means of overcoming zoning restrictions against group homes, litigation is particularly unsatisfactory. Unlike lawsuits challenging State statutes or Statewide practices, zoning disputes require almost constant litigation against each new group of opponents and each municipal ordinance that unfairly discriminates against group-living arrangements. Given the expense and duration of lawsuits, legislative solutions are essential in this area.

Although some municipalities have rewritten their zoning codes to deal more rationally and consistently with community residences, the incremental approach to revising zoning ordinances is also an inefficient way to achieve realistic and appropriate regulation of community residences. As changes are made in local regulations, there may develop serious inequities in policies and programs from one locality to another within the same State.

Preemptive State legislation presents the most encouraging way of coping with the impact of restrictive zoning ordinances which discriminate against group-living arrangements by mentally handicapped persons. Such legislation treats a small group of handicapped persons who reside together as the "family" which they functionally are. As a family, the group need not obtain zoning approval prior to moving into their home in "single family residential" zones. Such legislation has no fiscal impact and in fact eliminates the possibility of expensive and time-consuming litigation. Legislation of the type recommended has now been enacted in a growing number of States, now numbering ten.[53]

52. Compare *City of White Plains v. Ferraioli*, 34 N.Y.2d 300 (1974) with *Browndale Int'l. v. Board of Adjustment*, 208 N.W.2d 121 (Wisc. 1973).

53. California, Colorado, Michigan, Minnesota, Montana, New Jersey, New Mexico, Ohio, Rhode Island and Virginia. See, for example, California Welfare and Inst. Code § 5116; Minn.

The experience of some States which have recently passed preemptive zoning statutes has been that both building codes and mutual private restrictive covenants can undermine the attempt at reform. Building codes can make distinctions in terms of the number of unrelated persons in a dwelling and can require prior local zoning approval before issuance of a building (or renovation) permit, which may bring local zoning ordinances into play. The private covenants are also a serious problem, already existing on many plots and being written to "protect" neighborhoods.

Enactment and implementation of preemptive State zoning laws could be facilitated by limiting Federal assistance to communities with zoning laws allowing for group homes.

Closely related to the problem of restrictive zoning is the tendency of some municipalities to encourage or allow group homes to locate only in certain less desirable sections of a city. In some instances, group homes have followed a line of least resistance, locating in such areas rather than going through the delay and expense of zoning disputes. As a result, some of our cities have developed "social service ghettos." These "ghettos" destroy the residential character of the affected neighborhoods and subvert the right of handicapped persons to live in normal residential surroundings. A prohibition on excessive concentration would protect municipalities against the creation of such ghettos by assuring the dispersal of group homes and would assure handicapped persons that they will be able to reside in normal residential areas.

State laws can achieve these results by establishing reasonable criteria for the location of new group homes. For example, the Minnesota law which governs the licensure of group homes[54] prohibits the granting of a new license to a group home when the effect of granting such a license would be the excessive concentration of community residential facilities within any town, municipality or county in the State. In making this determination, the statute requires the licensing agency to consider the population, size, land-use plan, availability of community services and the number and size of existing public and private community residential facilities in the town, municipality or county in which a licensee seeks to operate a residence. The statute further requires the agency to establish regulations to implement its provisions.

Legislation to control the concentration of group homes should be included as a necessary part of a comprehensive and balanced solution

Stats, § 462.367. Note that five of those 10 State statutes were enacted during the last State legislative session.

54. Minn. Stats. § 252.28.

to the issue of zoning for group homes for mentally handicapped persons.

Recommendation 2.

(a) *Title VIII, Fair Housing, of the Civil Rights Act of 1968 should be amended to prohibit discrimination in housing on the basis of mental handicap.*

(b) *The Department of Housing and Urban Development should (1) encourage States and localities to allocate additional community development block grant funds to develop more group care facilities and (2) make additional rental assistance funds available to mentally disabled persons living in group homes.*

Commentary:

Congress has recognized and acted upon both the critical importance of housing for all segments of the population and, in section 504 of the Rehabilitation Act of 1973, the fact of widespread discrimination against handicapped persons. Unfortunately, it has not yet acted to protect handicapped persons against private acts of discrimination in housing. (Note that section 504 only prohibits discrimination by recipients of Federal financial assistance.) If community alternatives to institutional care are to be achieved, legislative action is required to protect mentally handicapped persons against housing discrimination.

The Federal government has already in place extensive legislation and enforcement mechanisms to protect members of racial minorities against discrimination in housing. A simple amendment to include mentally handicapped persons in Title VIII, Fair Housing, of the Civil Rights Act of 1968[55] would constitute a major legal protection for this group of citizens. The inclusion of such an amendment would in no way usurp the authority of those States that have taken initiatives to resolve this problem, because the Civil Rights Act requires the Federal government to defer to State and local fair housing acts which provide rights and remedies that are equivalent to those set forth in the Federal act.[56]

The second part of this recommendation is made by the President's Commission on Mental Health in its preliminary report.[57] The availability of adequate and affordable housing for many low-income persons, including mentally disabled persons who have low incomes,[58]

55. 42 *U.S.C.* § 3601 *et seq.*
56. 42 *U.S.C.* §§ 3610(c), 3616.
57. *Preliminary Report to the President*, the President's Commission on Mental Health, September 1, 1977, page 13.
58. See 42 *U.S.C.* 5303 (block grants) and 42 *U.S.C.* 1437f (rental assistance).

can be enhanced if such actions are taken.

4. *Guardianship*

Recommendation 1.

(a) *State guardianship laws should be revised to provide: (1) increased procedural protections including, but not limited to, written and oral notice, the right to be present at proceedings, appointment of counsel and a clear and convincing evidence standard as the burden of proof; a comprehensive evaluation of functional abilities conducted by trained personnel; and a judicial hearing which employs those procedural standards used in civil actions in the courts of general jurisdiction of any given State; (2) a definition of incompetency which is understandable, specific and relates to functional abilities of people; (3) the exercise of guardians' powers within the constraints of the right to least restrictive setting, with no change made in a person's physical environment without a very specific showing of need to remove a person to a more restrictive setting; and (4) a system of limited guardianships in which rights are removed and supervision provided only for those activities in which the person has demonstrated an incapacity to act independently.*

(b) *Public guardianship statutes should be reviewed for their effect in providing services to persons in need of but without guardianship.*

Commentary:

State guardianship proceedings have been the traditional means of providing supervision and protection to mentally handicapped persons who are residing in the community. As a result, large numbers of mentally handicapped individuals are subject to guardianship laws and to the profound legal consequences which accompany the guardianship process.

All 50 States have some form of incompetency proceedings. Current guardianship statutes generally authorize the appointment of a guardian upon a finding that a person is mentally incapable of caring for him/herself or his or her property. Following such a finding, a court typically authorizes a guardian to care for the "ward" in all matters connected with the ward's personal welfare and/or property. With this legally authorized transfer of decision-making authority to the

guardian, the ward is deprived of his or her fundamental civil rights,[59] including the right to choose a residence, the right to sue in his or her own behalf, the right to enter into contracts and, in some States, the right to vote, to hold a license and freely to marry. In addition, determination of incompetency may also result in the loss of other less obvious but equally fundamental rights. Among the recognized rights to citizenship which an adjudged incompetent may be denied are the right to go from place to place as s/he pleases,[60] to meet with persons in public places,[61] to enjoy the privacy of family life[62] and to determine appropriate medical care.[63]

While loss of physical freedom is not a necessary result of incompetency determinations, a determination of incompetency does often result in some form of institutionalization, particularly for the elderly. Sudden changes in environment have proved traumatic to elderly persons. When such changes in environment result in more restrictive personal control, in a nursing home or in an institution, for example, they can have serious physical effects on an elderly person and can even result in death.[64]

The deprivation of legal rights inherent in guardianship requires that guardianship laws must be scrupulous in their adherence to due process and must be carefully tailored to avoid any unnecessary restrictions. Unfortunately, many guardianship laws contain few, if any, procedural protections, and only a handful of State laws make provisions for limiting the power of guardianship to reflect actual abilities and disabilities of persons under guardianship.

According to the American Bar Association's Commission on the Mentally Disabled's recently completed 50-State survey of guardianship laws,[65] only 25 of the States require any sort of medical or psychological evaluation in connection with a guardianship proceeding, despite the requirement for guardianship of a finding of incompetency. And, while virtually all States make provision for a hearing to review the need for guardianship, laws in 37 States make no specific provision for the fundamental right to present or cross-examine witnesses. Many provide only for the appointment of counsel at the discretion of the court and few require counsel to be compensated by the State if the

59. See, generally, J. Regan and G. Springer, "Protective Services for the Elderly," a working paper prepared for the Special Commission on Aging, U.S. Senate, July, 1977.
60. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).
61. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).
62. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).
63. *Roe v. Wade*, supra.
64. See *Klein v. Mathews*, 430 *F. Supp.* 1005 (D. N.J. 1977).
65. American Bar Association Commission on the Mentally Disabled, draft unpublished document pertaining to rights of institutionalized developmentally disabled persons, in progress.

person is indigent. Numerous commentators have suggested that the procedural protections now established for involuntary commitment laws should also be statutorily required in guardianships.[66] In fact, the need for due process protection in guardianship determinations has been recognized by Chief Justice Burger in his concurring opinion in *O'Connor v. Donaldson*.[67]

Most States' definitions of incompetency are equally in need of revision. Incompetency definitions usually are vague and over-broad. It is often impossible to know whether a person is incompetent under the State's definition without reviewing thousands of individual cases to see what issues courts have found relevant. Just as with the standards for involuntary commitment it is crucial that definitions of incompetency be made specific, clear and understandable, so that rational and fair decisions concerning guardianship can be made. Guardianship proceedings can play an important role for persons who are not able to perform certain basic functions such as obtaining food, clothing and shelter. Specific definitions of incompetency along these functional lines can be written and, as with commitment laws, they should specify that the facts used to justify guardianship must be recent and relevant.

Statutory failure to provide for "limited" guardianship poses very serious legal problems. Because many mentally handicapped persons need only a limited degree of supervision, laws which treat guardianship as an "all or nothing" proposition tend to restrict important legal rights without justification. Such statutes cannot be considered a rational or reasonable exercise of governmental power and are of dubious constitutional validity. Consequently States which do not now require that guardianships be fashioned by courts to meet only the functional inabilities of a ward should amend their laws to permit guardianships only to the extent of and only as supported by proven functional needs.

Use of a functional definition of incompetency also requires consistent and periodic review, to permit lifting of the guardianship when the functional inability ceases. And a functional definition necessarily limits the guardianship to providing for care and assistance only in the context of the individual's particular functional problem.

The right to treatment in the least restrictive setting is discussed elsewhere in this report.[68] It is extremely important to include this par-

66. See Regan and Springer, *supra*, and Kindred, "Guardianship and Limitations upon Capacity," *The Mentally Retarded Citizen and the Law* (1976), pp. 63-87, at 75.

67. 422 U.S. 575, 583 (1975).

68. Numerous courts have held that government action which infringes on personal liberty must be limited to the extent necessary to achieve the governmental objective. This principle, known as the doctrine of the least restrictive alternative, was first enumerated by the Supreme Court in *Shelton v. Tucker*, 364 U.S. 479 (1960) and has been repeatedly applied in the mental health field. See, e.g., *Welsch v. Likins*, 373 *F. Supp.* 487, 502 (D. Minn. 1974); *Davis v. Watkins*,

ticular right specifically in all incompetency statutes. A guardian usually has the power to determine a ward's environment—an environment which can be unduly restrictive, such as a State institution or a locked nursing home. Concrete provisions to maintain a ward in a setting least restrictive of his or her civil liberties are necessary and are consistent with a policy encouraging keeping people in their own homes to the extent possible.[69]

The demand for the "public-guardian" concept usually comes from individuals or groups who seek to provide services to persons who everyone agrees are incompetent but who have no friends or relatives appropriate to serve as guardians. The number of persons in such need is unknown, but the problem seems to rest most heavily with elderly persons. About a dozen States have provided for public guardians who may be appointed to protect persons and their property.[70] These laws, however, differ in approach and extent. Delaware's public guardian, for example, deals primarily with financial matters and is not really a full-scale guardian. The California law, on the other hand, does provide for full guardianship through the public guardian's office, optionally on a county-by-county basis. The Minnesota law provides for guardianship of the person for mentally retarded individuals. Many States' guardianship statutes allow not only individuals but also organizations or governmental entities to serve as guardians. These statutes do not provide any specific controls over the State or the organization that serves as guardian, because those group guardians would be subject to the same controls as individual private guardians.

While it is tempting to espouse a system of public guardians because of the admitted need of some persons for this service, it is too early to proffer such a recommendation. Very little research has been undertaken so far on the need for or effectiveness of a public guardian. So that rational decisions can be made as to the advisability of a public guardian, a full examination is necessary. Simultaneously, other mechanisms such as private nonprofit corporations and public trusts should be explored.[71]

It is apparent that reform of State guardianship laws is long overdue. The Panel's recommendations are designed to ensure that State

384 *F. Supp.* 1196, 1206 (N.D. Ohio 1974). A strong argument can be made that use of plenary guardianship when limited guardianship suffices violates the least restrictive alternative doctrine. See also our discussion in III.8, *infra*.

69. Moreover, any placement in a restrictive setting should be preceded by a judicial hearing which determines the need for institutional care.

70. These include Arizona, California, Colorado, Delaware, Georgia, Illinois, Maine, Minnesota, North Carolina, Ohio, Oregon and South Dakota. See American Bar Association Commission on the Mentally Disabled draft unpublished document, above.

71. See Kindred, above, at 72-75.

guardianship laws conform to the basic requirements of due process. The recommended procedural standards represent those protections which are essential for a fair hearing. The recommendations for limiting guardianship to specified activities may be accomplished by providing the court both with testimony and a professional evaluation of the abilities and disabilities of the person being considered for guardianship.

Reforms similar to those recommended here have already been enacted in a number of States,[72] although no particular State's laws are a model for all of the suggestions of the Panel.

Reform of State guardianship laws should be neither controversial nor fiscally burdensome to the States. If achieved, such reform will constitute a major step in promoting the legal rights of mentally handicaped citizens.[73]

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72. See, for example, Cal. Probate Code 1460 § 1400 *et seq.*, *Idaho Code* § 15-5-101 *et seq.* and § 56-239, *Mich. Stat. Ann.* § 330.1600 *et seq.*, *Minn. Stat. Ann.* § 252A.01 *et seq.* and § 525.54 *et seq.*, *Montana Rev. Codes Ann.* § 91A-5-101 *et seq.*, *N.C. Gen. Stat.* § 35-1.6 *et seq.*, Texas Probate Code Ann. Title 5, § 130 *et seq.*, and *Wash. Rev. Code Ann.* § 11.88-005 *et seq.*

73. Two broad areas related to guardianship laws that are of special importance to the mentally handicapped were not fully studied by the Panel: protective services and the practice of appointing substitute payees for persons entitled to Federal benefits.

(a) "Protective services" usually refer to services offered a physically or mentally infirm older person or an abused, neglected, or deserted child or an adult mentally retarded person to assist him or her in carrying out activities of normal living or to protect him or her from further harm. These services can include health, medical, psychiatric, social or legal services. When provision of services is accepted voluntarily, and the intervention is slight, these are seen as "supportive" services. When the intervention is significant, or is resisted, there may be a need for legal intervention to authorize the necessary services. It is in situations where legal sanction is involved that the assistance offered is truly "protective services."

Unfortunately, many State protective services laws provide for involuntary protective services without the same due process procedural protections which are required by State guardianship or involuntary commitment laws. These proceedings should not be used as a method of avoiding the constitutionally required procedures.

Additionally, a State's involuntary commitment, guardianship and protective service laws should interrelate to each other in a rational manner and definitions should be consistent. For a full discussion of protective services for the elderly and for a model adult protective services act, see Regan and Springer, above.

(b) Federal laws provide for appointment of a substitute payee for a person entitled to receive Federal funds when that beneficiary is incapable of managing his or her funds. Social security payments, veterans' benefits, and other Federal benefits are affected.

These programs affect the mentally handicapped of all ages. Agency procedures and practices, however, vary as to supervision and review of how the substitute payee handles funds or when the substitute is appointed. The Social Security Administration, for example, without regard to the beneficiary's legal competence, asks merely whether the interest of the beneficiary would be served by the appointment of a substitute. (See, for example, 42 *U.S.C.* 405 (j), permitting payment of Federal old-age, survivors, and disability insurance benefits to "a relative or some other person.") Criteria and standards are vague, and there are many constitutional questions related to the entire system of substitute payees (see Regan and Springer, above, p. 44). The system does appear to serve a useful purpose, however, and might usefully be reviewed for reforms. Moreover, consideration should be given to whether the system might serve more effectively if it were part of or related to guardianship arrangements.

5. *Confidentiality*

The Task Panel agrees with the Congressionally-authorized Privacy Protection Study Commission that "the medical-care relationship in America today is becoming dangerously fragile as the basis for the expectation of confidentiality with respect to medical records generated in that relationship is undermined more and more. A legitimate, enforceable expectation of confidentiality that will hold up under the revolutionary changes now taking place in medical care and medical recordkeeping needs to be created."[74] Confidentiality, however, cannot be an absolute and unbending requirement, because it must be reconciled with legitimate needs for access to mental health records. With these recommendations the Panel attempts to balance the needs for confidentiality and access.

Recommendation 1.

> *Federal and State laws should recognize the principle that patients must have access to their mental health records and the opportunity to correct errors therein.*

Commentary:

It is ironic and unacceptable that at present in many jurisdictions patients cannot see their own mental health records even though these records are available to others. Personal access to an individual's records is essential. Aside from patients' right to know about the information compiled on them, such knowledge is essential if the patient is to give truly informed consent to release of such records. A person cannot consent to disclosure of information s/he knows nothing about.

Most Panel members agreed on the necessity for limited exceptions where the revelation of information could cause concrete harm or would violate a confidential relationship between the mental health professional and third parties who supplied the information. Such circumstances will be exceptional; several studies have shown that rather than causing harm, access to records has in fact increased patient cooperation and lessened anxiety.[75] Parents should have access to the records of their children except where children have sought therapy on their own. In such cases, children should have access to their own records.

Access to records is in itself insufficient without procedures for correcting information. Procedures set forth in the Privacy Act of

74. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, 1977, p. 306.

75. Roth, L., Wolford, J., and Meisel, A., *Patient Access to Records—"Tonic" or "Toxin,"* paper presented to the American Psychiatric Association at its annual meeting, May 1977.

1974[76] and the Buckley Amendments[77] could be used as models. Records should be copied with minimal reproduction fees and professionals should be available when necessary to aid in interpretation of information in the files. Where the patient disagrees with information in the file, the patient's own version should become a permanent part of the files, and mediation should be provided where professional and patient cannot agree on changes, with ultimate recourse to the courts when necessary. Education is essential, both for the public, so that patients know and can take advantage of their right of access, and for professionals, so that they can prepare records in an appropriate manner.

Recommendation 2.

> *Except where otherwise required by law, confidentiality of mental health information must be strictly maintained by all persons who have contact with such information. Mental health professionals must alert their patients at the outset of therapy about special conditions under which complete confidentiality cannot be maintained. States should also enact strong penalties for the inappropriate release of confidential materials by mental health professionals without the patients' consent.*

Commentary:

The Task Panel recognizes the importance of protecting the confidentiality of mental health treatment records from disclosure to others.[78] All mental health information must be so protected, even that in the files of general medical practitioners. While the primary caregiver has the most obvious responsibility to preserve confidentiality, State laws should include penalties against anyone who discloses confidential information without consent. The Privacy Commission has recommended criminal fines and penalties for disclosure[79] and the Department of Health, Education, and Welfare, in a response to the Privacy Commission report, recommended injunctive relief and damages, to include actual damages, punitive damages in cases of willful disclosure, attorney's fees and general damages of not less than $1,000 nor more than $10,000.[80] The Panel endorses those recommendations. Uni-

76. 4 *U.S.C.* 552a.

77. The Family Education Rights and Privacy Act, 20 *U.S.C.* 1232g.

78. See, in this regard, "Model Law on Confidentiality of Health and Social Service Records," prepared by the American Psychiatric Association (APA) Task Force on Confidentiality of Children's and Adolescents' Clinical Records and the APA Committee on Confidentiality and approved by the APA Executive Committee of the Board of Trustees, September 1977 and the APA Executive Committee of the Assembly, Feb. 4, 1978.

79. See *Personal Privacy in an Information Society*, above, pages 294-295.

80. "Report and Recommendations on Statutory Protection for Health Records," Department of Health, Education, and Welfare staff study, October 12, 1977, pp. 26-27. Transmitted to the

form State laws on testimonial privilege should also be developed, emphasizing that the privilege belongs to the patient or client. Those performing an evaluative function not protected by privilege (*e.g.*, competency evaluators) should be required to so inform the subject at the outset of their relationship.

The areas in which disclosure can be made without consent are very controversial, but Panel members agree that these exceptions must be carefully limited. For example, where a therapist knows that a patient is about to do serious harm to a third party, revealing that information to the police should not subject the therapist to legal penalties.[81] Many therapists believe, however, that if they are compelled to break a confidence for reasons of overriding social policy, they should inform the patient and terminate the therapy, if the patient so requests. In any event, it is the obligation of the therapist to inform the patient at the outset of therapy of the specific situations in which an exception to the principle of confidentiality will be made. To give another example, therapists should inform patients in advance that they will have to supply information when served with a subpoena. In this regard, the Panel condemns the frivolous use of subpoena power and strongly recommends that therapists be fully informed of their right to contest, and that patients be informed whenever any information concerning them is released.

The Panel further recommends that release of information for purposes of auditing mental health service programs be limited, and that laws be amended to allow information to be gathered without patient identifiers. Disclosure of information for research purposes is discussed more fully in another section of this report. It should, however, be noted that any confidential information utilized for mental health research purposes should be coded so as not to reveal the individual subject's identity, and information which identifies the subject should never be passed on to other researchers without express written consent of the subject.

Hon. Paul G. Rogers, Chairman, Subcommittee on Health and the Environment, House Committee on Interstate and Foreign Commerce, October 31, 1977.

81. The reader should note, however, that (without our attempting to formulate guidelines) there is a significant distinction between knowing with some degree of certainty that a patient is about to commit a crime and guessing or predicting. In a recent controversial decision the California Supreme Court has held psychotherapists responsible in damages for failure to warn an intended victim about their patient's threatened dangerous acts. *Tarasoff v. Regents of University of California*, 13 *Cal. 3d* 177, 118 *Cal. Rptr.* 129 (1974), reaffirmed 17 *Cal. 3d* 425, 131 *Cal. Rptr.* 14 (1976). While the Panel did not have the opportunity to explore the issues posed by *Tarasoff* in any detail, there was consensus that holding a therapist responsible for predicting dangerousness and requiring the therapist to play the role of "policeman," without extremely clear guidelines, would be unfair both because psychotherapists lack the expertise to predict future dangerous conduct accurately and because of the inherent conflicts in the roles of therapist and law enforcer. See our discussions of dangerousness and of the doubt agent, Sections III. 12 (pp. 146, 150-152) and Section V (pp. 176-179), respectively.

Recommendation 3.

Consent forms for release of information concerning patients' histories should be limited to particular items of information in their records relevant to the specific inquiry posed by third parties who have a legitimate need for such information. Blanket release forms should be prohibited, and nonspecific requests for information should not receive response. Consent to release information should be of limited duration and should be revocable by the patient at any time. A record should be maintained in each patient's file describing what information has been released, when, to whom and for what purposes.

Commentary:

Panel members are alarmed by the extent to which requirements of informed consent for release of mental health records are ignored or abused. Patients are often asked to sign away all rights to confidentiality. Blanket consent-to-release forms should be abolished and replaced by easy-to-understand, specific forms which make clear to whom distribution of information may be made. Patients should be informed that refusal to give consent will not jeopardize their right to present or future services except where disclosure is necessary for the specific service or claim in question. See, for example, the recommendation and discussion on appropriate employment questions which follows. The duration of consent should be limited and individuals should have the right to revoke it at any time. For example, in order for insurance companies to perform legitimate cost-and quality-control functions they must occasionally have access to mental health information. Because of the individual's right to privacy and because information about the individual's mental health will change over time, insurance companies should not be permitted to obtain information freely at any time or to store information over long periods of time.

A disclosure log must be included in each file which will show the date and content of the disclosure and the recipient of the information. Disclosure logs are required under the Privacy Act, the Buckley Amendments and several State fair information practices laws and they have been put into effect without undue administrative burden. Consent for release of information from the files of children should be given jointly by the child and the parents, and alternatives, such as the sealing of children's mental health files when they reach a determined age, should be explored.

Recommendation 4.

Employers' questions to job applicants and employees must be related to objective functioning skills directly relevant to the specific job for which the applicant or employee is being considered.

Commentary:

Employers should not be permitted to ask job applicants and employees general questions concerning the nature or severity of any psychiatric or treatment disorders. In a recent case, a social worker was turned down for a county job after refusing to answer questions about such matters as "depression or excessive worry" and "trouble sleeping". The consent order filed in the case halted use by the county government of an employee medical history form which requested intimate details about mental health treatment and which required general release of job applicants' medical records. Such broad questions must be abolished. The burden should be on the employer to justify any inquiry. To avoid stigma or discrimination based upon past mental status, emphasis should be placed upon probationary evaluation periods for new employees. Any mental health information gained from the job applicant or through medical examinations must be held in strict confidentiality. The employer should have no access to the files of employees receiving mental health care as a benefit of employment.

This recommendation adopts and expands the approach of section 504 of the Rehabilitation Act of 1973.

Recommendation 5.

Third-party insurers should be encouraged to utilize peer review or other similar mechanisms which allow an evaluation of the necessity and appropriateness of treatment to be conducted while the patient's identity remains anonymous. Centralization and sharing of personal information without the express, written consent of the patient or client should be prohibited.

Commentary:

Insurers need information to process claims. The burden should be on the insurance company, however, to seek only that information which can be shown to be relevant to determine the appropriateness of a claim and to protect personal information from further dissemination or release. Background data on a patient's mental health history should not be maintained and information should not be gathered from sources other than the patient and the care-giver. Insurance companies should be liable for any release of information. The public should be

notified of the existence of data banks, of their rights to have access to and to change personal information and of their right to refuse to consent to centralization and sharing of this mental health information.[82]

Recommendation 6.

The Task Panel has reviewed and generally supports the report of the Privacy Protection Study Commission, Personal Privacy in an Information Society, concerning confidentiality of medical records. Implementation of that Commission's recommendations should be required not just in Medicare/Medicaid institutions as the report suggests but by all facilities maintaining mental health records.

Commentary:

Task Panel members agreed on general support of the thorough and thoughtful report of the Privacy Commission. We recommend, however, that implementation of its recommendations on medical records not be limited solely to institutions covered under Titles XVIII and XIX of the Social Security Act. Rather, all recipients of Federal funds that provide mental health services should be required to implement the Privacy Commission's recommendations, and private institutions should be encouraged by the States to follow these recommendations.

6. *Federal Benefits*

Recommendation 1.

Existing Federal statutes, regulations and programs should be reviewed for instances of discrimination against mentally handicapped individuals. Appropriate legislative or administrative action should be taken to eliminate barriers and other restrictive provisions or practices.

Commentary:

Supplemental Security Income (SSI), Medicare, Medicaid, Social Services; Old Age and Survivors and Disability Insurance; food stamps; CHAMPUS and Veterans' Administration entitlements; specialized services such as vocational rehabilitation, maternal and child

82. An alternative which the Panel thinks worthy of consideration is requiring third-party payors to use statements of the general "level of functional impairment" rather than diagnosis in evaluating the necessity and appropriateness of treatment. Such statements would numerically record the patient's level of functional impairment at the time of the treatment in question without saddling the patient with a diagnostic label which could impart lasting stigma. Such an approach has undergone a preliminary test and has been termed "an outstanding success." See "APA Insurance Code System Said Success," Psychiatric News, December 16, 1977, p. 21. See also *Confidentiality and Third Parties*, Task Force Report 9, American Psychiatric Association, 1975, pp. 14-20.

health services, family planning services, and nutritional programs for the elderly—the list of Federal benefits potentially available to mentally handicapped persons is somewhat staggering. Sadly, this list is not an accurate measure of governmental concern for mentally handicapped persons or of the resources actually available to such individuals. To the contrary, mentally handicapped persons often do not receive the full benefits of these Federal programs and are sometimes excluded from eligibility because of their handicap or the locale where the service is provided. These types of discrimination are compounded by restrictive interpretations of "disability" or "illness," by failure to disseminate information about existence of resources or eligibility for benefits and by jurisdictional confusions. Indeed, the experience of many potential beneficiaries of Federal programs is that administrators adopt a negative attitude: "What can I do to keep you from getting this assistance"?

The various Federal benefit programs share only one feature: None views the mentally handicapped individual as a whole person; rather, each, by its nature, attempts to compartmentalize applicants and forces them to fit themselves into arbitrary and conflicting pigeonholes. Each program has its own economic and programmatic eligibility requirements, provides its own level of care and/or offers its own level of benefits. It is difficult enough for a person who is not mentally handicapped to traverse this quagmire, but it can be nearly impossible for many mentally disabled beneficiaries who are expected to "go it alone" at a time when they have no resources, financial or otherwise, and no one to help them along. These legal and administrative barriers to assistance for mentally disabled persons, particularly those attempting to survive in the community and return to society's mainstream, must be identified and eliminated.

Identification and modification of discriminatory or unreasonable Federal practices or requirements should be accomplished, at least in part, in connection with the President's proposed reform of Federal welfare programs and in any proposed program of national health insurance. The welfare reform bill already proposed by the Administration,[83] for example, could usefully be modified in several respects. Under this proposal, reduced benefits would be paid to a mentally handicapped person who has worked in the past but is now able to work only episodically. The automatic assumption that such a person is able but is unwilling to work (which is the cause of the reduction of benefits) is discriminatory. The bill would also mandate review for ability to work every three months. Such frequent reviews may in fact

83. See H.R. 9030 and S. 2084, 95th Congress, 1st Session.

constitute harassment for many mentally handicapped individuals. And the Administration proposal would retain the provision for reduction in benefits for an adult "living in the household of another" which is found in the present welfare legislation. Such a provision constitutes a disincentive to keeping families together.

Moreover, the Department of Justice has already announced its intention to conduct a survey, in conjunction with the operating agencies, of existing Federal laws and programs with a view to eliminating or revising provisions which discriminate on the basis of sex. The Panel urges the Department to expand its announced survey to identify instances of discrimination against, or unfair treatment of, mentally disabled individuals, in connection with income maintenance and medical assistance programs and other areas of Federal law.

The primary examples of discrimination in Federal assistance programs are the limitations on coverage of mental health treatment under the Medicare and Medicaid programs.[84] Medicare limits payment for inpatient psychiatric services in psychiatric institutions to 190 days per lifetime[85] and for outpatient physicians' services to $250 per year;[86] persons between the ages of 21 and 65 are excluded altogether from the Medicaid reimbursement for treatment in a psychiatric facility.[87] These provisions are made even more irrational by such provisions as those allowing reimbursement for services in a general hospital but not for the same services in a mental hospital[88] and the "50 percent rule," which deems facilities to be psychiatric in nature—and thus subject to benefit restrictions and limitations—because more than half the residents are mentally ill.[89] Most of these limitations have been upheld by

84. See generally 42 *U.S.C.* 1395 *et seq.* and 42 *U.S.C.* 1396 *et seq.*, respectively.

85. 42 *U.S.C.* 1395d(3) and 1395d(c).

86. 42 *U.S.C.* 1395l(c).

87. See 42 *U.S.C.* 1396d(a)(4), (a)(14), (a)(16), and (a)(17), and 1396d(h). These sections define the Medicaid limitations on payments for skilled nursing (facility) services to patients in institutions for mental diseases who are 21 years of age or older, on payment for inpatient hospital services, skilled nursing home services or ICF services for individuals 65 years of age or over in an institution for mental diseases, and on treatment in mental hospitals for individuals under age 21; exclude care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution) or who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental disease, and limit the receipt of inpatient psychiatric hospital services by those under 21.

Note that the exclusion for inmates of public institutions applies to inmates of jails and prisons. See our discussion of criminal justice system issues in section III. 12, below.

88. Definitions of "inpatient hospital services" (42 *U.S.C.* 1395x(b)) and "hospital" (42 *U.S.C.* 1395x(e)) do *not* place any limitations on the diagnostic categories of "mental, psychoneurotic and personality disorders" as are stated in 42 *U.S.C.* 1395l(c); but all patients who receive "inpatient psychiatric hospital services" (42 *U.S.C.* 1395x(c)) in "psychiatric hospitals" (42 *U.S.C.* 1395x(f)) are subject to the 190 day lifetime limitation in 42 *U.S.C.* 1395d(b)(3).

89. The excluded institutions are those 'primarily' providing care for patients with 'mental diseases.' An institution is characterized as 'primarily' one for mental diseases if it is licensed as such, if it advertises as such or if more than 50 percent of the patients are in fact patients with mental disease. In some instances a facility may be 'primarily' concerned with such individuals because they concentrate on managing patients with behav-

the courts against constitutional attack,[90] but they are nonetheless logically and programmatically indefensible. The distinctions between mental health and other kinds of health care should be eliminated; the cost of doing so can be minimized by reducing the emphasis on and need for institutional confinement (see below).

In this connection, the Task Panel agrees with the recommendation in the President's Commission's preliminary report that the current Medicaid ICF (intermediate care facility) provisions be expanded to include such facilities for mentally ill persons, in addition to those for mentally retarded individuals and others already authorized under the law (see below). The Panel would limit this class of providers, however, to facilities serving 15 or fewer patients. Additionally, provider requirements for "generic" skilled nursing facilities and intermediate care facilities should be directed toward their role in caring for mentally handicapped persons. Both staffing and structural standards should reflect the therapeutic needs of the mentally handicapped and the importance of a nonrestrictive environment.

Another area of irrationality and arbitrariness is in the definitions of mental disability for purposes of SSI (Supplemental Security Income) eligibility.[91] The current definitions should be reviewed for equity and for consistency with current concepts in psychiatry and other disciplines. Indeed, the entire administration of the SSI program (if it is continued) needs to be improved in order to make eligibility and recertification procedures more humane, to enhance information, referral and outreach efforts and to foster communication with and understanding of mentally handicapped individuals. For example, it should be possible at least to keep a client's SSI file open when he returns to a mental hospital and/or to consider persons released from mental institutions "presumptively disabled,"[92] in order to avoid repeated and frustrating delays in receipt of desperately needed payments by persons returning to the community.

Handicapped children face special difficulties in receiving Federal benefits under Medicaid and SSI. Under the Medicaid program, both

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ior or functional disorders and are used largely as an alternative care facility for mental hospitals, even if less than 50 percent of the patients have actually been diagnosed as having a mental disease.

—Social and Rehabilitation Service, Field Staff Information and Instruction Series: FY 76-44, *Federal Financial Participation in Payments for Care in Institutions for Mental Disease*. November 1975.

See also 42 *U.S.C.* 1396d(a)(4) and (15) and (a)(14) and pertinent regulations contained in 45 C.F.R. 248.60 and 45 C.F.R. 249.10(c)(1).

90. See *Legion v. Richardson*, 354 *F. Supp.* 456 (S.D.N.Y. 1973); *Kantrowitz v. Weinberger*, 388 *F. Supp.* 1127 (D.D.C. 1974), affirmed 530 *F.*2d 1034 (1976).

91. 42 *U.S.C.* 1382c(a)(1).

92. 42 *U.S.C.* 1382(e)(1)(B).

maintenance and services are reimbursed for children in institutions, while the program pays only for medical care for children in less restrictive settings. Home health care, while a mandatory service for adults, is not required for those under 21. This amounts to a disincentive for deinstitutionalization. The SSI program has reached only a small fraction of eligible children as a result of inadequate outreach and follow-through procedures and restrictive definitions of disability.

Recommendation 2.

(a) *Federal assistance programs should be administered and governing legal provisions modified, where necessary, to implement the principle of placement or treatment in the "least restrictive alternative" and to foster deinstitutionalization of mentally handicapped individuals. Appropriate measures might include the following steps:*

(1) *A class of intermediate care facilities for mentally ill persons, comparable to those for mentally retarded individuals and others but limited to a maximum of 15 beds, should be created under the Medicaid program.*

(2) *"Clinic services" should be a required rather than an optional service in Medicaid; the limitations on outpatient physician services in Medicare should be eliminated; and both Medicare and Medicaid benefits should be made available for inpatient and outpatient services in community mental health centers for the mentally handicapped of all ages.*

(3) *The thrust of the current Medicaid intermediate care program for mentally retarded persons should be directed toward community-based, rather than institutional, facilities for mentally retarded persons, and appropriate changes should be made in the ICF/MR regulations where necessary to facilitate use of Medicaid funds for community-based programs. Medicaid should also be amended to require health services for children under 21.*

(4) *The Department of Health, Education, and Welfare should strictly enforce the Medicaid standards for residential institutions for mentally retarded persons set forth in 45 C.F.R. §§249.12 and 249.13 and should ensure prompt decertification of those large institutions which do not meet the standards.*

(5) *Preadmission or admission certification, peer review and utilization review and relevant PSRO activities requirements should be enforced in all inpatient facilities under Medicare and Medicaid to ensure that hospital, skilled nursing (SNF) or intermediate (ICF) care is provided only on the basis of individual need and that alternative, less restrictive placements are considered and provided when appropriate.*

(6) *HEW should require State plans submitted pursuant to Title XX of the Social Security Act (42 U.S.C. 1397 et seq.) to address specifically the problems and needs of mentally handicapped persons who live in the community or who could live in the community if financial or other assistance were available.*

(7) *HEW should require State Developmental Disabilities Councils and other agencies funded under the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6001 et seq.) to focus their activities on deinstitutionalization of developmentally disabled individuals and on creation of community-based living arrangements, day programming and support services for such individuals. HEW should specifically prohibit use of D.D. Act funds for construction, renovation or expansion of large institutional facilities.*

(8) *HEW should develop regulations which require State mental health plans mandated under Pub. L. 94-63 (42 U.S.C. 2689t) and State health plans required under Pub. L. 93-641 (42 U.S.C. 300m-2(a)(2); 42 U.S.C. 300k-1 et seq.) to evaluate resources for community programs for the mentally handicapped and to plan for the development of community resources that will ensure that mentally handicapped persons are enabled to live in the least restrictive setting consistent with their individual needs.*

(9) *Federal guidelines for State regulation of group homes (board and care homes) where SSI recipients are living should emphasize the need to encourage personal independence and to provide access to necessary health care and social services. The Department of Health, Education, and Welfare should*

ensure rapid compliance with the interim regulations requiring counseling, and social and other services for children under 7 as well as for those children unable to attend school.

(10) *Federal AFDC foster care funds*[93] *for children should only be available if out of home placement is in the least restrictive setting and in as close proximity to the child's home as is consistent with the child's special needs.*

(11) *The Department of Health, Education, and Welfare should, within the Office of the Secretary, examine the impact of Supplemental Security Income, Medicaid and other Federal programs on the deinstitutionalization of mentally handicapped children, and develop specific proposals for reducing inconsistent fiscal incentives and regulations.*

(b) *As a direct, initial, positive step, the Federal government should develop within 180 days of the Commission's report a coordinated response to and plan for implementation of the recommendations contained in the GAO report of January 7, 1977, "Returning the Mentally Disabled to the Community—Government Needs to Do More".*

Commentary:

In recent years, a substantial number of courts have concluded that mentally handicapped persons have a right to live and receive treatment, if necessary, in the least restrictive environment consistent with their needs.[94] At the same time, a growing number of States have endorsed the concept of deinstitutionalization for those mentally handicapped persons who are capable of living in the community. Despite these positive trends, practical steps have yet to be taken to ensure that mentally handicapped persons can live and work in environments which maximize their opportunities for independence. There is a great need for the development of adequate community based mental health and mental retardation services and support systems.

Funding restrictions have profound implications for most of the desirable community living arrangements. Supplemental Security Income (SSI) restrictions on recipients and Medicare and Medicaid limi-

93. 42 *U.S.C.* 608.

94. See, for example, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Lake v. Cameron*, 364 *F.*2d 657 (1966); *Dixon v. Weinberger*, 405 *F. Supp.* 974 (D.D.C. 1975); and *Wyatt v. Stickney*, 344 *F. Supp.* 373 and 387 (M.D. Ala. 1972), aff'd. sub. nom. *Wyatt v. Aderholt*, 503 *F.*2d 1305 (5 Cir. 1974).

tations on providers as well as recipients negatively affect the accessibility and availability of services to the mentally handicapped. Current funding patterns do not readily lend themselves to initiating and maintaining community support systems; transferring institutional resources to the community, if at all possible, has proved difficult; start-up funds for new community programs are scarce and funding sources are fragmented; fiscal incentives often work against service goals. In fact, the Federal government is often placed in the unfortunate position of officially supporting financial disincentives to small congregate living arrangements.

Therefore the Task Panel, as noted above, would agree with the President's Commission's preliminary recommendation with respect to creation of a class of "ICF/MH" providers under Medicaid, governed by a separate set of staffing, programmatic and physical plant requirements which would be tailored to the special needs of mentally ill persons but would not be unduly burdensome and restrictive and would facilitate movement into the community. The Panel supports the provision of Medicare and Medicaid reimbursement for services provided by community mental health centers, so that persons needing such help can obtain it in a convenient and unrestrictive setting. Other changes in Medicare and Medicaid provisions also may be necessary to ensure availability of other types of community services such as home health and day care services.

Modifications in ICF and SNF standards and provider requirements are needed because for many persons with both physical and mental handicaps these facilities may represent the most appropriate care facility. While Federal regulations cover many aspects of the physical structure and staffing of these facilities, there are no specific provisions which require the facility to be able to identify and meet the unique needs of the mentally handicapped.

Similarly, some of the institution-oriented physical standards and medically-based staffing requirements in the current Medicaid (ICF/MR) regulations governing mental retardation facilities ought to be amended, with due regard for the health and safety of beneficiaries, to allow for reasonable application to community residential facilities. The current HEW regulations provide an elaborate set of requirements, tailored to large, traditional mental retardation facilities, which must be met in order to allow Federal reimbursement for services provided to mentally retarded clients. Originally, such standards were to be met no later than March 18, 1977. However, on June 3, 1977, HEW amended the regulations, primarily to allow large State facilities until July 18, 1978 for correction of staffing deficiencies and to give them

until July 18, 1980—and in some cases, until July 18, 1982—for correction of fire safety and other physical plant deficiencies. Such an extended period for correction of basic institutional shortcomings has the double drawback of permitting mentally retarded individuals to be maintained in substandard and even dangerous facilities for up to five more years and encouraging States to continue to invest huge sums of money in facilities which should more appropriately be phased out or greatly reduced in size.

HEW would be better advised to begin now to withdraw reimbursement from inadequate and unneeded institutions and to enforce existing admission and review requirements,[95] thus requiring States to plan for and implement movement of clients to less restrictive settings. States must not continue to be encouraged in the belief that the simplest—perhaps the only—way to qualify for Medicaid reimbursement for mental retardation services is to build "bigger and better" institutions.

The same kind of action is required with respect to other Federal programs, in order to ensure the availability of community resources and services for mentally handicapped individuals. For example, HEW should require (1) that States allocate a portion of their Title XX expenditures for the deinstitutionalization efforts of their mental health and mental retardation agencies and to prevention of future institutionalization of handicapped persons, and (2) that social support services necessary for comprehensive community care be a component of all State plans under Title XX. (If such a requirement cannot be imposed by regulation, the Administration should seek the necessary legislation.) Similarly, the regulations issued by HEW under the Developmentally Disabled Assistance and Bill of Rights Act,[96] which now merely parrot the general language of the statute, should be amended where appropriate,[97] to require emphasis on deinstitutionalization and prevention of future institutionalization and to prohibit expenditure of scarce Federal or other public funds on renovation or construction of inappropriate institutional facilities.

Just as the Federal government should take specific steps to facilitate deinstitutionalization for adults, so too it must assume more leadership on behalf of the deinstitutionalization of children. A major step in this direction would be to ensure that all federally funded out-of-home placements for children are in the least restrictive setting. In addition, there is a pressing need for an inter-agency examination of the

95. These requirements should be enforced in all programs for mentally handicapped persons which are financed by Medicare or Medicaid payments.

96. 45 *C.F.R.* Parts 1385-1387.

97. For example, 45 *C.F.R.* §§ 1386.17(b), 1386.42, 1386.43, 1386.47, 1386.48.

Federal role both within the Department of Health, Education, and Welfare (e.g., the National Institute of Mental Health and the Administration for Children, Youth and Families) and outside of it (e.g., the Law Enforcement Assistance Administration and the the Office of Juvenile Justice and Delinquency Prevention in the Department of Justice). The present lack of Federal leadership in this area should be corrected.

Finally, while the Panel does not possess the factual information necessary to evaluate every recommendation of the above-mentioned GAO report, we approve of the thrust of the GAO recommendations and believe the Federal government should proceed with a plan for their implementation. We acknowledge the establishment of a Task Force on Deinstitutionalization by the Secretary of Health, Education, and Welfare in October 1977 and urge cooperation by all other Federal departments in the efforts begun by this Task Force.

Recommendation 3.

> *Necessary steps should be taken to adapt and, where necessary, expand "generic" Federal programs so that they meet the needs of mentally handicapped individuals. Provision in the laws creating such programs which are designed to assist the mentally handicapped should be fully and promptly implemented.*

Commentary:

Existing Federal programs in such diverse areas as housing, vocational rehabilitation and aid for veterans and the elderly can, with proper emphasis, be a valuable source of assistance for mentally handicapped individuals. In many instances, they can mean the difference between institutionalization and life in the community for such individuals. The recommendation in the President's Commission's preliminary report (pp. 12-13) with regard to housing programs is an excellent example of how Federal funds and leadership could enhance the lives of mentally disabled persons.

Additionally, consideration should be given to steps to help prepare mentally disabled individuals for a vocational goal. For example, a longer period of training and a more structured learning situation may be necessary for the mentally disabled to acquire vocational skills and a longer period of post-employment services for such individuals may be necessary to assure that they maintain employment. The Panel feels that vocational rehabilitation programs, in general, have not been particularly responsive to mentally handicapped persons' needs and, like other generic programs, must be adapted to meet the needs of more severely disabled clients than they are accustomed to serving. We do

applaud the recent amendments to the vocational rehabilitation legislation which mandate that if a State agency cannot serve all eligible individuals it must select first those individuals with the most severe handicaps.[98] But this provision is not in practice effectuated by the States. We believe that consideration must also be given to services oriented toward increasing the capacity for independent living of severely mentally handicapped persons who cannot be employed.

The Federal government should also require that State and area agencies funded under the Older Americans Act amendments[99] provide for an assessment of the needs of the mentally handicapped elderly and include services for this group in their development of community-based resources for the elderly. With regard to veterans, the Panel feels that the role of the Veterans' Administration in providing psychiatric services—particularly in administering psychiatric hospitals—should be carefully studied. VA institutions have already been criticized because of their remote locations and because of the artificiality of an environment made up almost exclusively of male, chronic patients.[100] In any event, the current practice of involuntary transfer or commitment of veterans in one State to a VA hospital in another State should be ended, by Federal and State statutory revision if necessary or by administrative action to the extent possible. The VA should use its resources to provide or pay for psychiatric services to veterans in locations as close as possible to their home communities or at least within their State of residence.

Recommendation 4.

> *Federal program and funding agencies should promptly promulgate and enforce regulations implementing section 504 of the Rehabilitation Act of 1973, which specifically prohibits discrimination against handicapped persons by any recipient of Federal funds.*

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98. 29 *U.S.C.* 721 (a)(5)(A).

99. See the Older Americans Act of 1965, as amended, Pub. L. 89-73, as amended. Under the amendments, the Administration on Aging within the Department of Health, Education, and Welfare is required to "develop plans, conduct and arrange for research in the field of aging, and assist in the establishment of and carry out programs designed to meet the needs of older persons for social services, including nutrition, hospitalization, pre-retirement training, continuing education, low-cost transportation and housing, and health services" (42 *U.S.C.* 3012(a)(4)). The Act also provides for grants or contracts for model projects to promote the well-being of older persons, with special consideration to programs that will "provide services to assist in meeting the particular needs of the physically and mentally impaired older persons including special transportation and escort services, homemaker, home health and shopping services, reader services, letter writing services, and other services designed to assist such individuals in leading a more independent life" (42 *U.S.C.* 3028(a)(4)). There is, however, no requirement that the State agency include an assessment of the needs of mentally ill older persons in the State plan (42 *U.S.C.* 3025).

100. See "Health Care for American Veterans," Report of the Committee on Health-Care Resources in the Veterans' Administration, National Research Council, National Academy of Sciences. Washington, National Academy of Sciences, 1977.

Commentary:

Discrimination practices in education, employment, housing, transportation and other public and private services could be significantly curtailed if Federal agencies other than the Department of Health, Education, and Welfare (HEW) would promptly issue program-specific regulations, as HEW has already done, implementing section 504 with respect to the programs funded or supported by each such agency. Section 504, which prohibits discrimination in federally assisted programs on the basis of mental or physical handicap, was enacted more than four years ago; now that HEW has done the groundwork with its extensive 504 regulations, there is no reason why all other affected agencies should not be instructed to follow suit within 180 days.

Moreover, so that the full impact of section 504 can be realized, enforcement procedures should be specified and funds made available for their effectuation. We understand, for example, that until very recently the Office of Civil Rights (OCR) in HEW spent less than one percent of its time on section 504 enforcement and that there at present exists a three year backlog of complaints. More staff and fiscal resources are obviously necessary if OCR is to handle and address issues of systematic discrimination.

Recommendation 5.

> *There should be periodic program reviews of the utilization of federally funded benefits and services by the mentally handicapped in order to assess the quality and quantity of services provided and to determine their effectiveness in meeting the needs of the mentally handicapped and in promoting independent living.*

Commentary:

Facts available on the number of mentally handicapped individuals who are eligible for or receiving benefits from the various federally funded programs are inadequate to assess need for services or appropriate utilization. The lack of data also hampers program reviews to determine appropriateness and quality of services. An adequate data base should be established to provide the basis for periodic assessment of the effectiveness of these programs in meeting the needs of the handicapped and in providing them equal access to benefits, and for making necessary changes in program administration or legislation. Regular periodic reviews of programs and provider standards must focus on the effect of these programs and standards on the clients.

It would be tragic if the Panel's recommendations resulted in a mere redistribution of funds and of funding sources or solely in increasing the number of providers, but had no impact on improving actual patient/client care and treatment. Periodic program reviews should help to assure that reforms in Federal mental health benefit programs are focused directly on the ultimate beneficiaries of these services.

7-9. *The Right to Treatment and to Protection From Harm, The Right to Treatment in the Least Restrictive Setting and The Right to Refuse Treatment and the Regulation of Treatment*

Recommendation 1.

The President's Commission in its final report should endorse the underlying legal and ethical bases for the right to treatment and to protection from harm, the right to treatment in the least restrictive setting and the right to refuse treatment and the regulation of treatment. The Federal and State governments should be encouraged to protect these rights by legislation and other appropriate action.

7. *The Right to Treatment and to Protection From Harm*

Commentary:

While the Supreme Court has not directly decided whether there is a constitutional right to treatment (for mentally ill persons) or to habilitation (for mentally retarded persons), the overwhelming weight of legal authority is that (at least) all involuntarily confined mental patients have a "constitutional right to receive such treatment as will give them a reasonable opportunity to be cured or to improve (their) mental condition" (*Wyatt v. Stickney*).[101] To fulfill this treatment right, a State must provide a humane physical and psychological environment, qualified staff personnel in sufficient numbers and individualized treatment or habilitation plans for each client.[102]

101. *Wyatt v. Stickney*, 325 *F. Supp.* 781, 784 (M.D. Ala. 1971), 334 *F. Supp.* 1341 (M.D. Ala. 1971), 344 *F. Supp.* 373 (M.D. Ala. 1972), 344 *F. Supp.* 387 (M.D. Ala. 1972), aff'd *sub. nom. Wyatt v. Aderholt*, 503 *F.*2d 1305 (5 Cir. 1974).

102. *Wyatt*, 334 *F. Supp.*, at 1343. To satisfy these conditions, the *Wyatt* court ordered State officials to implement *detailed* sets of standards (developed from recommendations submitted by all parties and *amici curiae* in 25 different areas (mental health) and 49 areas (mental retardation), including environmental conditions, medical treatment, physical facilities, staff ratios, compensation for employment, treatment/habilitation plan specifications, nutritional requirements, and plans for transitional care). 344 *F. Supp.* at 379-386; 344 *F. Supp.* at 395-407. The *Wyatt* court also appointed a seven-member "human rights committee" for each affected institution to review "all research proposals and all treatment/habilitation programs to ensure that the dignity and human rights of residents are preserved," and to advise and assist residents who allege their legal rights have been infringed. 344 *F. Supp.* at 376; 344 *F. Supp.* at 392.

In affirming the trial court's ruling in *Wyatt*, the Fifth Circuit Court of Appeals relied largely on its decision several months earlier in *Donaldson v. O'Connor*.[103] The Fifth Circuit panel in *Donaldson* had noted:

> [P]ersons committed under what we have termed a *parens patriae* ground for commitment must be given treatment lest the involuntary commitment amount to an arbitrary exercise of government power proscribed by the due process clause . . . . The second part of the theory of a due process right to treatment is based on the principle that when the three central limitations on the government's power to detain—that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed—are absent, there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate rehabilitation and care beyond the subsistence level custodial care that would be provided in a penitentiary.[104]

Donaldson surveyed the procedural contexts in which attacks on the nature of nonpenal confinement arose and found that there must be a *quid pro quo* for confinement in circumstances "where the conventional limitations of the criminal process are inapplicable."[105]

Although the *Donaldson* case was heard by the Supreme Court and was vacated and remanded on other grounds, this action should not be seen as an explicit or implicit rejection of the right to treatment rationale.[106] *Wyatt* has also been followed in other significant Federal cases, such as *Welsch v. Likins*,[107] *Davis v. Watkins*,[108] and *Gary W. v. State of Louisiana*.[109] It should also be noted that the constitutional right to treatment for involuntarily committed mental patients has re-

103. *Donaldson v. O'Connor*, 493 *F.*2d 507 (5 Cir. 1974), vacated and remanded on other grounds sub. nom. *O'Connor v. Donaldson*, 422 *U.S.* 563 (1975). See footnote 106, below.

104. 493 *F.*2d at 521-522.

105. *Id.* at 524.

106. 422 *U.S.* 563 (1975). In the course of its opinion, the Supreme Court vacated the Court of Appeals' judgment which affirmed a jury verdict of both compensatory and punitive damages. In remanding the case for reconsideration only of the monetary damages issues, the Court noted that "our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case," *id.*, note 12, at 577. However, after its *Donaldson* decision, June, 1975, the Supreme Court denied *certiorari* in *Burnham v. Georgia*, 422 U.S. 1057 (1975), a companion case to *Wyatt v. Aderholt, supra*, in which the Fifth Circuit's *Donaldson* rationale for a right to treatment was explicitly reaffirmed. That rationale, as adopted in *Wyatt* and *Burnham*, accordingly remains the law of the Fifth Circuit.

107. 373 *F. Supp.* 487, 493 (D. Minn. 1974), further proceedings at 550 *F.*2d 1122 (8 Cir. 1977).

108. 384 *F. Supp.* 1196, 1203-1212 (N.D. Ohio 1974).

109. *Gary W. v. Cherry*, sub nom. *Gary W. v. Louisiana*, 437 *F. Supp.* 1209 (E.D. La. 1976). But see *Morales v. Turman*, 562 *F.*2d 993 (5 Cir. 1977).

ceived an unusual amount of scholarly discussion and support.[110]

Mentally handicapped residents of institutions also have a constitutional right to protection from harm. This was the theory under which the consent decree was approved in the "Willowbrook" case, making clear that persons who live in State mental institutions are owed certain affirmative constitutional duties by the State and its officials.[111] While consent decrees ordinarily have little precedential effect, the impact of the *Willowbrook* decree was substantially enhanced when the court issued a formal order ratifying the decree and an additional memorandum discussing its constitutional basis. In this memorandum the late Judge Orrin B. Judd noted that:

> During the three-year course of this litigation, the fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process.
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> * * *
>
> [The steps, standards and procedures in the consent decree] are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and . . . that a certain level of affirmative intervention and programming is necessary if that capacity for growth is to be preserved, and regression prevented.
>
> * * *
>
> The consent judgment reflects the fact that protection from harm requires relief more extensive than this court originally contemplated, because harm can result not only from neglect but from conditions

110. The first articulation of the right is found in Birnbaum, "The Right to Treatment," 46 *A.B.A.J.* 499 (1960). In the last 15 years more than 50 law review articles have been published on the subject, virtually all of them supporting a constitutional right to treatment or release for the involuntarily confined. *See, e.g.*, Comment, "Developments in the Law—Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190 (1974).

Note also that in addition to the due process basis, the constitutional right to treatment is also seen as resting on the cruel and unusual punishment clause (found specifically applicable to mental hospitals in *Rozecki v. Gaughan*, 459 *F.*2d 6 (1 Cir. 1972), and developed in the context of jail and prison conditions suits).

Although criteria for measuring the "adequacy" of treatment have not been specifically articulated by the courts, it has been suggested by respected commentators that "effectiveness" is a reasonable standard, and that such adequacy must be determined by "an inquiry into the adequacy of the *individual's* treatment." Halpern, "A Practicing Lawyer Views the Right to Treatment," 57 *Geo. L.J.* 782, 792 (1969) (emphasis added). See also Schwitzgebel, "Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria," 8 *Harv. Civ. Rights—Civ. Lib. L. Rev.* 513, 520 (1973) and, generally, Sadoff, Cohen and Cohen, "Right to Treatment," 3 *Bull. Am. Acad. Psych. & L.* 59 (1975). Cf. Birnbaum, "A Rationale for the Right," 57 *Geo. L.J.* 752 (1969). And see Hoffman and Dunn, "Beyond *Rouse* and *Wyatt*: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment," 61 *Va. L. Rev.* 207, 303-10 (1975).

111. *New York State Association for Retarded Children v. Rockefeller*, 357 *F. Supp.* 752 (E.D.N.Y. 1973); *New York State Association for Retarded Children v. Carey*, No. 72-C-356/357 (E.D.N.Y., April 30, 1975), *approved* 393 *F. Supp.* 715 (E.D.N.Y. 1975) [hereinafter *NYSARC*].

which cause regression or which prevent development of an individual's capabilities.[112]

The court held, in effect, that relief very much like the *Wyatt* Standards—but with a greater emphasis on deinstitutionalization and community-based residential and habilitation programs—was required by the Eighth Amendment for mentally retarded persons under State custody, regardless of whether the incarceration was characterized as "voluntary" or "involuntary."

At a minimum, as the Third Circuit has noted:

> It is far too late in the game for the serious assertion of the proposition that the federal Constitution is not implicated with respect to the physical conditions to which a state subjects persons it chooses to confine by virtue of a civil or criminal judgment of commitment.[113]

Among the rights owed to institutionalized patients or residents under even the most limited reading of the Eighth and Fourteenth Amendments are "a tolerable living environment," protection from physical harm, correction of conditions which violate "basic standards of human decency," the opportunity to exercise and participate in recreation and the "necessary elements of basic hygiene."[114] Additionally, patients and residents are owed a duty by those charged with their custody "to preserve . . . [their] life, health and safety beyond any duty owed to the general public."[115] Clearly, their confinement must be therapeutic, not punitive.[116]

In addition to prohibitions on certain *physical* intrusions, psychological oppression and acts causing mental distress are similarly within the proscription of the Eighth Amendment. The Second Circuit recently noted, "psychological oppression is as much to be condemned as physical abuse, and this Court has previously determined that acts causing mental suffering can—even absent attendant body pain—violate the Eighth Amendment."[117]

Even if there were not a Federal constitutional right to treatment or to protection from harm, States would be free to create such a right by statute. In fact, a number of States now provide a statutory right to

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112. 393 *F. Supp.* at 716-718.

113. *Scott v. Plante*, 532 *F.*2d 939, 947 (3 Cir. 1976).

114. See, for example, *NYSARC, supra*, 357 *F. Supp.* at 764, 765 (tolerable living environment, basic hygiene); see also such prison cases as *Hamilton v. Love*, 328 *F. Supp.* 1182 (E.D. Ark. 1971) (protection from physical harm); *Brenneman v. Madigan*, 343 *F. Supp.* 128, 133 (N.D. Cal. 1972) (basic standards of human decency); *Hamilton v. Schiro*, 338 *F. Supp.* 1016, 1017 (E.D. La. 1970) (exercise and recreation).

115. *Roberts v. State*, 307 N.E.2d 501, 505 (Ind. Ct. App. 1974).

116. *Kesselbrenner v. Anonymous*, 33 *N.Y.*2d 161, 350 N.Y.S.2d 889, 892 (Ct. App. 1973).

117. *United States ex rel Shuster v. Vincent*, 524 *F.*2d 153, 160 (2 Cir. 1975). The recent Supreme Court decision in *Ingraham v. Wright*, 430 *U.S.* 651 (1977), generally limiting the protection of the Eighth Amendment to persons convicted of a crime, left a specific exception for involuntarily institutionalized individuals.

treatment or protection from harm either for persons involuntarily committed to State mental institutions or for all persons residing in such institutions. Another basis for a right to treatment is an ethical obligation, translated into actuality by allocations of fiscal resources for mental health purposes. It is the consensus of the Panel that society in general has an ethical duty to provide adequate and effective services for all mentally handicapped persons in need of them including voluntary as well as involuntary patients. The rationale for this ethical obligation is the notion that society may ultimately be measured in a moral sense from the way it treats its most vulnerable and disadvantaged citizens.

Models for statutory rights to treatment and protection from harm include recent enactments from Florida and Wisconsin.[118]

Fla. Stat. Ann §394.459(1), (2), (4)(a):

> Right to treatment—The policy of the state is that the department shall not deny treatment for mental illness to any person, and that no services shall be delayed at a receiving or treatment facility because of inability to pay.
>
> Quality of treatment—Each patient in a facility shall receive treatment suited to his needs, which shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community. In order to achieve this goal the department is directed to coordinate the programs of the division with all other divisions of the department.

Wis. Stat. Ann. 51, 61 (1)(m):

> [All patients] have a right to a humane psychological and physical environment within the hospital facilities. These facilities shall be designed to afford patients with comfort and safety, to promote dignity and ensure privacy. Facilities shall also be designed to make a positive contribution to the effective attainment of the treatment goals of the hospital.[119]

It is also suggested that State laws include specific language applicable to mentally retarded persons—for example, the current New Jersey provision:

N.J.S.A. 30:6D-9:

> Every service for persons with developmental disabilities offered by any facility shall be designed to maximize the developmental poten-

118. If the Commission recommends relatively simple language such as that in the statutes cited herein, it is suggested that a relatively lengthy commentary accompany such a recommendation, in order to underscore the significance of the rights involved.

119. This section of the Wisconsin law, however, is subject to denial or limitation following an administrative hearing subject to court review. *Wis. Stat. Ann.* 51.61(3). It is recommended that such limitations *not* be permitted by the States.

tial of such persons and shall be provided in a humane manner in accordance with generally accepted standards for the delivery of such service and with full recognition and respect for the dignity, individuality and constitutional, civil and legal rights of each person receiving such service, and in a setting and manner which is least restrictive of each person's personal liberty.

In the past several years Congress has exhibited a heightened awareness of the vulnerability of mentally handicapped citizens and of their need for Federal protection. For example, section 201 of the Developmentally Disabled Assistance and Bill of Rights Act[120] states, "Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities," and "the Federal government and the States both have an obligation to assure that public funds are not provided to any institution or other residential programs for persons with developmental disabilities that . . . does not provide treatment, services, and habilitation which is appropriate to the need of such persons."

Implementation of specific treatment standards could be facilitated at the Federal level by making adherence to such standards a requirement for receipt of Federal funds, as is now done to some extent under the Medicaid and Medicare programs.[121]

8. *The Right to Treatment in the Least Restrictive Setting*

Commentary:

The principle of the "least restrictive alternative" has been invoked by courts when they are informed of governmental actions that infringe basic individual rights rooted in the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments. The basic rights capable of triggering an inquiry into whether governmental limitations are consistent with the "least restrictive alternative" principle have included freedom of association, freedom to travel, freedom to practice one's religion, freedom to exercise the franchise and privacy between marriage partners.[122] Once a court determines that a basic right has been infringed by governmental action, the next inquiry is whether the government has demonstrated a "compelling state interest" to justify the infringement, and whether the means chosen to vindicate such a com-

120. 42 U.S.C. § 6010, Public Law 94-103.

121. See, for example, 45 C.F.R. §§ 249.12 and 249.13.

122. *Shelton v. Tucker*, 364 *U.S.* 479 (1960) (association); *Aptheker v. Secretary of State*, 378 *U.S.* 500 (1964) and *Shapiro v. Thompson*, 394 *U.S.* 618, 637 (1969) (travel); *Sherbert v. Verner*, 374 *U.S.* 398, 407 (1963) (religion); *Carrington v. Rash*, 380 *U.S.* 89, 96-97 (1965) (franchise); *Dunn v. Blumstein*, 405 *U.S.* 330, 335-337 (1972), and *Griswold v. Connecticut*, 381 *U.S.* 479, 485-486 (1975) (privacy between marriage partners).

pelling interest are the least restrictive of personal liberty consistent with the particular governmental objectives.

The Supreme Court in *O'Connor v. Donaldson*,[123] discussed earlier under the right to treatment, by expressly citing *Shelton v. Tucker*,[124] acknowledged the appropriateness of applying the principle of the "least restrictive alternative" to involuntary commitments. The constitutional principle holds that: "[E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[125]

The applicability of the doctrine of the least restrictive alternative to the circumstances of the civilly committed mental patient becomes immediately apparent when the massive curtailments of personal rights and liberties inherent in civil commitment are considered. Thus, when a person is committed to a psychiatric hospital, his/her constitutionally protected rights to travel and freely associate with others are inevitably curtailed, and protected rights to peacefully assemble, communicate, practice religion and enjoy sexual privacy are likewise constricted. And, of course, s/he is in danger of losing "the most basic and fundamental right . . . the right to be free from unwanted restraint."[126]

In the civil commitment context, the applicability of the doctrine is two-fold in nature:

> the recognition of an affirmative state obligation to require a search for alternatives to institutional commitment *ab initio* . . . [and] . . . a . . . duty . . . to limit confinement to the least restrictive institutional setting and to discharge the committed patient outright, or to less restrictive community treatment alternatives, once continued institutionalization could no longer be therapeutic.[127]

Thus, "committing courts and agencies must refrain from ordering hospitalization whenever a less restrictive alternative will serve as well or better the State's purposes."[128] And, in at least six cases, it has been held that the Federal Constitution requires an affirmative demonstration that no suitable less restrictive alternative exists prior to involuntary hospitalization.[129]

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123. 422 *U.S.* 563, 575 (1975).

124. 364 *U.S.* 479 (1960), cited at 422 *U.S.* at 575.

125. 364 *U.S.*, above, at 488.

126. *Lessard v. Schmidt*, 349 *F. Supp.* 1078 (E.D. Wis. 1972), vacated on other procedural grounds, 414 *U.S.* 473 (1974), on remand 379 *F. Supp.* 1376 (E.D. Wis. 1974), vacated and remanded on procedural grounds 421 *U.S.* 957 (1975), reinstated 413 *F. Supp.* 1318 (E.D. Wis. 1976).

127. Saphire, "The Civilly Committed Public Mental Patient and the Right to Aftercare," 4 *Fla. St. U.L. Rev.* 232, 280-281 (1968).

128. Chambers, "Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives," 70 *Mich. L. Rev.* 1108, 1145 (1972).

129. *Lessard v. Schmidt*, above; *Covington v. Harris*, 419 *F.*2d 617, 623 (D.C. Cir. 1969);

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In holding that patients already committed have a constitutional right to treatment geared to curing or improving their mental conditions, the *Wyatt* court included the least restrictive alternative doctrine among the mandatory minimum constitutional standards for adequate treatment.[130] The State was required not only to provide institutional treatment in the least restrictive setting, but also to provide "adequate transitional treatment and care for all patients released after a period of involuntary confinement."[131] Similarly, in *Davis v. Watkins*,[132] in addition to instituting a periodic review system for each patient's treatment plan, the court specified that such plans must provide for treatment in the least restrictive setting while the individual is confined, as well as preparation of pre-release and transitional treatment plans for the individual patient.

In *Gary W. v. Louisiana*,[133] the court made clear that the concept of the least restrictive alternative applies to children who are in State custody but not in mental hospitals. In that case the plaintiffs were mentally handicapped children who were placed by the State of Louisiana in Texas institutions. The judge in his ruling noted:

> . . . What is proper for a particular child includes consideration not only of whether the child should be placed in an institution or treated in the community; it also includes consideration of the kind and geographic location of the institution or place of treatment . . . . The persons preparing the treatment plans for each child will be required to consider the least restrictive alternative for that child . . . .[134]

The legally protected right to treatment in the least restrictive setting necessary was recently reaffirmed in *Dixon v. Weinberger*.[135] There the plaintiff class—patients confined in a federally administered mental institution in Washington, D.C.—raised both statutory and constitutional grounds for the relief sought, *i.e.*, "a judicial declaration that under the 1964 Act[136] they have a right to treatment which includes placement in facilities outside St. Elizabeths Hospital where such placement is determined to be consistent with the rehabilitative purposes of the 1964 Act . . . ."[137] Plaintiffs sought to impose a duty on defendants

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Dixon v. Attorney General of Commonwealth of Pennsylvania, 325 *F. Supp.* 966, 974 (M.D. Pa. 1971); *Wyatt v. Stickney*, 344 *F. Supp.* 373, 379 and 387, 396; *Welsch v. Likins*, 373 *F. Supp.* 487 at 501-502 (D. Minn. 1974); *Lake v. Cameron*, 364 *F.*2d 657 (D.C. Cir. 1966).

130. 344 *F. Supp.*, above, at 379.

131. *Id.* at 386.

132. 384 *F. Supp.* 1196, 1197 (N.D. Ohio 1974).

133. *Gary W. v. Cherry*, sub nom. *Gary W. v. State of Louisiana*, 437 *F. Supp.* 1209 (E.D. La. 1976).

134. *Id.* at 1219.

135. 405 F. Supp. 974 (D.D.C. 1975).

136. The District of Columbia Hospitalization of the Mentally Ill Act, 21 D.C. Code § 501 *et seq.*

137. 405 *F. Supp.* at 976.

to "initiate a plan for the development of alternative facilities and the placement of appropriate individuals therein."[138] Although the court deemed it unnecessary to reach the constitutional grounds, in light of the explicit right to treatment provided in the District of Columbia statute, "suitable care and treatment in light of present knowledge" was held to include placement in alternative facilities and, significantly, to create such facilities if they did not presently exist.

As with the right to treatment, there would be strong ethical and social policy reasons for adopting the principle of the least restrictive alternative even if there were no statutory or constitutional basis for this important principle. In fact, long-standing Federal policy has favored deinstitutionalization wherever possible.[139] In view of this well accepted Federal policy, it is ironic that the Department of Health, Education, and Welfare continues to be in violation of the *Dixon* court's order some two years after HEW, along with the District of Columbia government, was charged with implementing that decision. The Panel, therefore, urges that HEW promptly take all actions necessary to implement the *Dixon* ruling and to extend its application to all relevant Federal programs.

9. *The Right to Refuse Treatment and the Regulation of Treatment*

Commentary:

While a strong consensus has emerged concerning the rights to treatment and to protection from harm and to treatment in the least restrictive setting, discussed immediately above, the Panel recognizes that significant controversy exists in academic, mental health professional, judicial and public circles as to the "right to refuse treatment" and the issue of regulation of treatment.[140] Traditionally, decisions about therapies or medical procedures have been within the unfettered

138. *Id.*

139. See, for example, the Community Mental Health Centers Act, 42 *U.S.C.* § 2689 *et seq.*; Grants to States for Comprehensive Public Health Services, 42 *U.S.C.* 246(d)(2)(D); reports of the Joint Commission on Mental Illness and Health, especially its final report, *Action for Mental Health*. New York: Basic Books, 1961.

140. *Cf.* Staff of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93d Congress, 2d session, "Individual Rights and the Federal Role in Behavior Modification," (1974); "Note, Conditioning and Other Technologies Used to 'Treat'? 'Rehabilitate'? 'Demolish'? Prisoners and Mental Patients," 45 *S. Cal. L. Rev.* (1972); Shapiro, "Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies," 47 *S. Cal. L. Rev.* 237 (1974); Friedman, "Legal Regulation of Applied Behavior in Mental Institutions and Prisons," 17 *Ariz. L. Rev.* 39 (1975); and Perlin, "The Right to Refuse Treatment in New Jersey," 6 *Psych. Annals* 300 (1976), with Treffert, "Dying With Your Rights On," (unpubl. paper presented at annual meeting of American Psychiatric Association, May 1974); Treffert, "Dying With Their Rights On," *Prism* (1974), at 47, as cited in Hoffman, "Living With Your Rights Off," in Bonnie, ed., *Psychiatrists and the Legal Process: Diagnosis & Debate* 231, 236 (1974); Rachlin, "One Right Too Many," 3 *Bull. Am. Acad. Psych. & L.* 95 (1975). See also Brooks, "The Right to Refuse Treatment," *Administration in Mental Health*, Vol. 4 No. 2, pp. 90-95 (1977).

discretion of the treatment professional responsible for a patient's or client's program. Recently, however, concern has arisen about imposition of potentially hazardous or intrusive procedures upon objecting recipients. As a result, attempts have been made to sketch out the situations in which even involuntary mental patients might refuse particular treatments or, alternatively, in which outside regulation and scrutiny of such procedures (including "customary" procedures such as psychotropic drugs) is required.

The right to refuse treatment stems from a composite of bases including the constitutional rights to freedom from harm, freedom of speech and thought, and personal privacy.[141] Advocates seeking to establish limitations upon forced therapy have brought cases challenging appalling situations— for example, that of patients who were subjected to the use of apomorphine, administered as part of an "aversive conditioning program . . . for not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying,"[142] or that of other fully conscious patients whose breathing was temporarily stopped with succinylcholine as part of "aversive treatment."[143] The Eighth Circuit Court of Appeals ruled, in the apomorphine case, that the unconsented treatment violated the "cruel and unusual punishment" clause of the Eighth Amendment and the Ninth Circuit held that, if proved, the nonconsensual use of succinylcholine could raise "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with mental processes."

Similarly, in the course of an opinion reversing a decision by a Federal district court which had dismissed a patient's *pro se* complaint alleging that he had been involuntarily medicated, the Third Circuit found "at least three conceivable constitutional deprivations that may accompany the involuntary administration of such substances by State officers acting under color of law to inmates of a state institution."[144] These included interference with the patient's First Amendment right to freedom of speech and association because of the potential effect of such drugs on his mental processes; deprivation of procedural due process in that the patient had not been given notice and a hearing to determine if he wanted to object to such treatment; and, "under certain circumstances," a possible claim under the Eighth Amendment's cruel and unusual punishment clause.[145]

141. See, for example, *Rozecki v. Gaughan*, 459 F.2d 6 (1 Cir. 1972), and *Kaimowitz v. Michigan Dept. of Mental Health*, No. 73-19434-AW, 42 *U.S.L.W.* 2063 (Mich. Cir. Ct., July 10, 1973).

142. *Knecht v. Gillman*, 488 *F.*2d 1136, 1140 (8 Cir. 1973).

143. *Mackey v. Procunier*, 477 *F.*2d 877, 878 (9 Cir. 1973).

144. *Scott v. Plante*, 532 *F.*2d 939, 946 (3 Cir. 1976). The patient had received thorazine, compazine, mellaril, vesprin and trilofan during the course of his hospitalization.

145. The court also pointed out that there might be a "fourth" deprivation regarding invasion

It is clear, then, that the mere characterization of a procedure as "treatment" will not insulate it from judicial scrutiny, especially when extreme or unusual intrusions are involved.[146]

For a consent to a therapy or medical procedure to be valid, it must be competent, knowing and voluntary. A mentally handicapped person may lack the competency or capacity to consent if he cannot understand the nature and consequences of a proposed procedure, or if for certain other reasons he cannot manifest this consent. For consent to be "knowing," a person should have all the information concerning the proposed procedure which he reasonably needs in order to make an intelligent decision. Such information would certainly include: the nature of the proposed procedure; its likelihood of success; the likelihood, nature, extent and duration of any positive impacts, harms or side effects; the reasonable alternative procedures available; and an explanation as to why the specific procedure recommended is the procedure of choice. In order to assure that the decision is truly voluntary, the person should be informed orally and in writing that no benefits or penalties will be contingent upon his agreement or refusal to undergo the proposed procedure. More specifically, there must be an explicit oral and written understanding by an institutional resident that his consent is not a precondition for release from the institution, that his decision should not be made to obtain approval from or to avoid reprisals by the staff and that he is free to withdraw consent at any point, without penalty.

Not everyone agrees that patients should have a right to refuse hazardous or intrusive treatments, even assuming agreement on which treatments fall within this category. But even many of those persons who question the concept of a right to refuse treatment recognize that there are problems, for example, of abuse or excessive use of psychotropic drugs and that there is a need for regulation of such procdures. Although most procedures remain unregulated by statute, a number of

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of a patient's "right to bodily privacy," but noted that the scope of such a right remains "ill-defined." *Id.* at 946, n.9.

146. Varying proposals have been made as to the degree of scrutiny required, including, *e.g.*, the need for a ten-point consent form to be signed prior to the imposition of psychosurgery, Spoonhouse, "Psychosurgery and Informed Consent," 26 *U. Fla. L. Rev.* 432, 452 (1974), expansion of the list of therapies that should not be permitted prior to a hearing, Stone, *Mental Health and Law*: A System in Transition, DHEW Pub. No. (ADM) 75-176, U.S. Government Printing Office, Washington, D.C., 1975, p. 105, an analysis of "the degree of intrusiveness" and the "severity of its effects upon cognitive facilities" of potentially dangerous treatment, "Developments—Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190, 1345 (1974), a hierarchy of human needs based on Maslow's motivational theories, Note, "The Right Against Treatment: Behavior Modification and the Involuntarily Committed," 23 *Cath. U.L. Rev.* 774, 780-84 (1974), and a sliding scale of acceptability of therapeutic techniques through which a court would weigh competing factors on a "hierarchy of legitimacy," Gobert, "Psychosurgery Conditioning, and the Prisoner's Right to Refuse Rehabilitation," 61 *Va. L. Rev.* 155, 193-95 (1975). See generally, Friedman, *supra* note 140 and Perlin, *supra* note 140.

States have recently passed laws which limit the imposition of certain treatment procedures by requiring the informed consent of persons in institutions. The most frequently regulated procedures are psychosurgery and electroconvulsive therapy.[147] Administrative rules and regulations may also provide a basis for a right to refuse treatment.[148] Because States have differing statutes, rules and regulations, it is impossible to generalize as to the future, but it is clear that there is a trend toward increased regulation.

Obviously, the balance between legal and medical judgments is delicate with respect to choice of treatment. A useful clarification appears in a district court order regulating hazardous and intrusive procedures.

> It must be emphasized at the outset of this order that, in setting forth the minimum constitutional requirements for the employment of certain extraordinary or potentially hazardous modes of treatment, the Court is not undertaking to determine which forms of treatment are appropriate in particular situations. Such a diagnostic decision is a medical judgment and is not within the province, jurisdiction or expertise of this Court. But the determination of what procedural safeguards must accompany the use of extraordinary or potentially hazardous modes of treatment on patients in the state's mental institutions is a fundamentally legal question.[149]

Although reduction to specific statutory language is difficult, it is suggested that the following concepts be adopted:

1. During the period preceding a formal commitment hearing, a patient should have an absolute right to refuse treatment of any sort unless the patient is endangering his/her own life or the lives of others; provided, however, that no intrusive treatment should be imposed unless less restrictive means of treatment have been exhausted without success.

2. A voluntary patient should have the absolute right to refuse treatment, and there should be a meaningful spectrum of choices of potential treatments for such patients.

3. No involuntarily committed patient should be given any of the following treatments over his or her objection, at least without a due process hearing (there was disagreement on the Panel as to whether this

147. See, e.g., Note, "Regulation of Electroconvulsive Therapy," 75 *Mich. L. Rev.* 363 (1976); *Price v. Sheppard*, 239 N.W.2d 904, 908 (Minn. Sup. Ct. 1976); and *In re W.S.*, 152 N.J. Super. 398, 405-07, 377 A.2d 969 (Cty. Ct. 1977).

148. See, e.g., "Guidelines for Psychotropic Drugs as Used by the Michigan Department of Mental Health," Michigan Department of Mental Health, 1977, and Michigan Department of Mental Health Administrative Manual, Chapter 4 Section 005 Subject 0002 (Psychotropic Drugs), October 6, 1976.

149. *Wyatt v. Hardin*, Unpublished Order, Civil No. 3195-N (M.D. Ala., Feb. 28, 1975).

hearing should be before a judge or an administrative official or committee):

a. Electroshock therapy or any other convulsive therapy;

b. Coma or subcoma insulin therapy;

c. Behavior modification utilizing aversive therapy;

d. Inhalation therapy (CO^2, etc.);

e. Medically prescribed, highly addictive substances (e.g., methadone).[150]

4. An involuntarily committed but competent patient shall have the right to refuse medication unless the patient is an imminent danger to himself/herself/ or others.[151] If an involuntarily committed patient who is also incompetent expresses a desire to refuse medication, there should be a due process hearing—on short notice—to determine the need for such medication, in light of the factors set forth at "5" below.

5. At any due process hearing held in accordance with this section, the patient shall be physically present, represented by counsel and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of such procedures. In the event that a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing.* At such a hearing, the court should consider all "treatment variables." Such variables would include the patient's legal status (as to issues of voluntariness and competency in both law and fact), the treatment setting, the modality of treatment, the motivation of the treater, the circumstances of the treatment, the intrusiveness of the treatment, the existence of legislative limitations, whether the patient is an inpatient or outpatient, the irreversibility of the treatment, the qualifications of the treater (whether he or she is a mental health professional), whether such treatment is life-saving or not (and if it is, whether it is the patient's life or another's involved), whether the treatment is psychiatric or "medical" (*e.g.*, non-psychiatric drug administration or surgery), and whether or not the situation is characterized as an emergency (again, both in fact and in

150. The Panel recommends that psychosurgery—which is considered highly dangerous and experimental—not be used in institutions and that it should be used elsewhere, if at all, only with the informed consent of the subject. See generally Section 111. 10, "Experimentation with Mentally Handicapped Subjects," below. In addition, the courts have placed substantial, as well as consent-related, limits on such techniques as aversive conditioning and ECT. See *Wyatt v. Hardin*, supra.

151. In the latter case, there should be a hearing mechanism which can be triggered on short notice at the request of the patient or his advocate.

* At least two panel members disagree with several aspects of these recommendations, believing in particular that having a second due process hearing after the initial commitment is excessively cumbersome and would result in unnecessary delay of treatment. They believe that treatment questions should be adjudicated at the time of the "initial" due process hearing. While they have no problem with the right to refuse ECT or psychosurgery, they have strong reservations about the right to refuse medications.

law).[152] Additionally, testimony should be taken as to all available alternatives to the treatment in question, as well as the potential efficacy, risk and restrictiveness of such treatment.

10. *Experimentation With Mentally Handicapped Subjects*

Recommendation 1.

> *An educational campaign must be directed to the general public with regard to individual opportunity and obligation to participate in the advancement of scientific knowledge. A disproportionate share of the risk for the benefit of society as a whole should not be assigned to "convenient"—often institutionalized—populations, including mentally handicapped individuals. Rather, to the extent possible, such persons should bear* less *risk than those who are more able to make free and uncoerced decisions.*

Commentary:

Everyone recognizes the importance of research in advancing our knowledge about the causes, prevention and techniques for curing or ameliorating mental handicaps. But news reports continue to remind us of excesses—sanctioned if not actually devised by governmental authorities—in the area of experimentation with human subjects. The history of abuses in experimentation includes several chapters involving institutionalized mentally disabled persons, such as the infamous Willowbrook (New York) hepatitis experiments (deliberate exposure of retarded children to hepatitis, on the basis of coerced parental consent); a similar but lesser known Willowbrook project using residents to test an ineffective shigella vaccine; the unconsented pneumonia, flu and meningitis experiments on residents of two State institutions in Pennsylvania; and the routine administration of Depo-Provera, an experimental and potentially harmful medication, to the female residents of mental institutions in Tennessee and elsewhere.[153] Such a recitation should also include the experimental psychosurgery, under the auspices of the State of Michigan, which was enjoined by the court in the case of *Kaimowitz* v. *Department of Mental Health*.[154]

152. See, generally, Perlin, 6 *Psych. Annals*, above, at 304.

153. Goldby, S., "Experiments at the Willowbrook State School," 1 *The Lancet* 749 (1971); testimony of Dr. Max Werner, December 12, 1974, *New York State Association for Retarded Children and Parisi v. Carey*, No. 72-C-356/357 (E.D.N.Y.); "Kids Used as Guinea Pigs," *Pittsburg Post Gazette*, April 14, 1973; hearings, "Quality of Health Care—Human Experimentation, 1973," Subcommittee on Health, Senate Committee on Labor and Public Welfare, February 21-22, 1973.

154. No. 73-19434-AW (Cir. Ct. of Wayne County, Mich., July 10, 1973).

On the other hand, such incidents actually represent a small deviation, so far as is known, from the general run of responsible and useful—or at least not harmful—experimentation with mentally disabled and other human subjects.[155] There is no question that some kinds of biomedical and behavioral research are necessary for continued advances in the diagnosis, prevention and treatment of mental and physical disabilities. Moreover, in the absence of a systematic approach, every patient or client becomes an experiment—yet nothing new is learned. Many drugs and procedures in current use are not considered experimental and are assumed to be of value simply because of familiarity or custom; but the only way truly to evaluate the effectiveness of these measures is through controlled clinical research.[156]

The basic issue, then, is the extent to which persons who have been deprived of their personal liberty on the basis of their alleged mental disability, or whose ability to give free and informed consent is otherwise questionable, should bear the burden of scientific progress on behalf of society as a whole. This issue is not just one of ethics. Where the individuals involved are in State institutions or confined pursuant to State law or where the research is conducted, supported or regulated by government agencies, it is also one of constitutional right.[157]

Persons confined to mental institutions are not incarcerated for the purpose of providing investigators with a captive population of research subjects, but rather to receive whatever services are necessary to enable them to return to society as quickly as possible.[158] Most institutions in the country, especially the large public institutions, are hard pressed to meet even minimal standards for safety, sanitation, staffing and habilitative and rehabilitative programs, and are hardly in a position to meet the increased demands imposed by the conduct of research projects. Moreover, such projects, if initiated, tend to attract concentrations of the best and most motivated institutional personnel (and the "best" patients or clients as well), to the detriment of patients or clients excluded from research projects as well as those subjected to the experimentation.

Because institutions are by nature removed from direct familial and public scrutiny, the potential for research abuses, intentional or

155. See Cardon *et al.* "Injuries to Research Subjects, A Survey of Investigators," 295 *New Eng. Jour. of Med.* 650 (1976).

156. See remarks of Eisenberg, L., in Experiments and Research with Humans: Values in Conflict, at 96 (Washington, D.C. 1975).

157. See *Knecht v. Gillman*, 488 *F.*2d 1136 (8th Cir. 1973); *Mackey v. Procunier*, 477 *F.*2d 877 (9 Cir. 1973); *Kaimowitz v. Department of Mental Health*, No. 73-19434-AW (Cir. Ct. of Wayne County, Mich., July 10, 1973). *Cf. Rochin v. California*, 342 U.S. 165 (1952); Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92 (1914).

158. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wyatt v. Stickney*, 344 *F. Supp.* 373 and 387 (M.D. Ala. 1972). aff'd sub nom. *Wyatt v. Aderholt*, 503 *F.*2d 1305 (5 Cir. 1974).

not, cannot be discounted. Finally, patients or clients in institutions may not be able to give truly informed consent to participate in experimentation, both because of their presumably disabled condition and because of the well-recognized coercive effects of institutionalization itself.

Recommendation 2.

(a) Covert experimentation involving risks ought never to be permitted, regardless of the asserted justification, and full disclosure of such matters as research risks, expected benefits and the right to refuse participation must be made to potential subjects and, where appropriate, to their parents, surrogate parents or legal guardians.

(b) Experimentation which is neither directly beneficial to individual subjects nor related to such subjects' mental condition and which poses any degree of risk to such subjects should not be permitted with institutionalized mentally handicapped individuals.

(c) Research performed for the direct benefit of a mentally handicapped subject after nonexperimental procedures, if any, have been exhausted should be permitted where the risk/benefit ratio is favorable and there are adequate procedures for obtaining the subject's consent or, where appropriate, the consent of the subject's parent, parent surrogate or legal guardian. High-risk experimental procedures such as psychosurgery should be permitted, if at all, only upon the informed consent of the subject himself; some such procedures ought to be prohibited altogether, at least with respect to institutionalized individuals.

Commentary:

Covert experimentation, especially upon mentally handicapped individuals in institutions or the community, has no place in an ethical society. Nor, the Panel feels, does experimentation with institutionalized mentally handicapped persons which does not benefit them directly or relate to the prevention, diagnosis or treatment of their mental condition. There is no acceptable reason for testing a hepatitis or shigella vaccine, for example, on an institutionalized mentally disabled population when such physical ailments are not peculiar to mentally handicapped individuals and can be identified or induced as readily in experiments with subjects whose capacity and autonomy are not open to question.

On the other hand, research designed to improve an individual mental condition which has not responded to standard techniques

ought to be permitted, with proper safeguards, upon mentally handicapped persons. (Ideally, the benefits of such experimentation will extend to others who suffer from a similar or related condition—*i.e.*, there is also an expected gain in general scientific knowledge about that specific condition.) In general, objections to such research by a patient or client should be honored, although the objection of a legally incompetent individual might be overridden (or an experimental procedure might be imposed upon a nonobjecting incompetent subject) where the potential benefit is great and the risk comparatively low. In such cases, appropriate consent should be obtained from parents or legal guardians. Certain procedures, such as psychosurgery, involve such a high degree of risk that they ought never to be employed on the basis of substituted consent, and in some situations should be prohibited altogether. Psychosurgery, even if intended for therapeutic purposes, should be included in any discussion of high-risk experimentation because it is such a drastic and irreversible procedure and because so much uncertainty exists as to its effects and the factors influencing such effects.

Recommendation 3.

> *At a minimum, research upon mentally handicapped individuals for the purpose of obtaining new scientific or medical information should be conditioned upon the following requirements:*
>
> *(a) The research protocol must undergo independent review for scientific merit of the research design and for competence of the investigator.*
>
> *(b) The institution, if any, in which the research is to be conducted must meet recognized standards for medical-care, direct care and other services necessary to meet the increased demands imposed by research activities, in addition to the ordinary requirements of adequate care and treatment.*
>
> *(c) The proposed research must not reduce the level of habilitative or rehabilitative services available either to research participants or to patients or clients not included in the project.*
>
> *(d) The experimentation must involve an acceptably low level of risk to the health or well-being of the research subjects;*
>
> *(e) The proposed research should relate directly to the prevention, diagnosis or treatment of mental disability and should seek only information which cannot be obtained from other types of subjects. Such information should be of high potential significance for the advancement of acknowledged medical or scientific objectives related to mental disability.*

(f) Research involving risk may be performed only on patients or clients who are actually competent to consent to participation therein and who have in fact given such consent. Substituted consent to procedures involving risk should not be permitted except in the most unusual and compelling circumstances and never in the face of objections, however expressed, by the patient or client himself. All consent should be subject to review and approval by an independent body, with an opportunity for patients or clients to be advised and represented in this process by an independent advocate (who may be an attorney).

(g) All subjects, and where appropriate their parents or guardians, should be provided with and informed of their right to any follow-up care necessitated by unforeseen harmful consequences of the research project.

Commentary:

The most problematic questions in this area arise with regard to research which does not directly benefit a particular group of subjects but which promises to produce important new knowledge concerning mentally handicapped persons generally. The questions become even more difficult, if not insoluble, when children—by definition incapable of informed consent—are involved as subjects of such experiments.

So long as privacy and confidentiality are respected, the Panel is not particularly concerned with nontherapeutic research which is merely observational in nature or which involves the mere use or sampling of urine, feces or other specimens normally available or obtainable at no risk to the subject. Other, more instrusive types of experimentation, however, should be subject to at least the strictures outlined above. Since there is no anticipated benefit to the individual subject, the objections of patients or clients ought to be binding, whatever the age or legal competence of the person involved, and substituted consent should rarely if ever be permitted. In most instances, affirmative consent—rather than absence of objection—should be a prerequisite for involvement in nontherapeutic research.

In view of the risk inherent in much experimentation and the potential vulnerability of mentally handicapped subjects, particularly in closed institutions, the importance of institutional review boards and other monitoring bodies cannot be overstated. Clearly, such bodies should not be limited to or dominated by peers of the investigating clinicians, but should include attorneys, citizen advocates and mentally handicapped individuals or their representatives.

Recommendation 4.

(a) Whatever schema is eventually put forward by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research should be considered as tentative and subject to continuous review.

(b) A permanent National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, with a membership including mentally handicapped individuals and/or former patients or institutional residents and parents of children with mental handicaps should be established to evaluate and, if necessary, modify the policies resulting from the recommendations of the current Commission and to monitor the performance of institutional review boards and other bodies charged with protection of the rights of research subjects.

Commentary:

In 1973, Congress established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (Public Law 93-348), charged with recommending standards for the protection of research subjects. Final recommendations on experimentation with the "institutionalized mentally infirm" and on the functions of institutional review boards are anticipated shortly. Final recommendations for research on children have already been submitted.[159] The testimony before and deliberations of the National Commission illustrate the complexity of the issues related to experimentation with human subjects, particularly "special" or "vulnerable" subjects such as some mentally handicapped individuals.

While unequivocal and unambiguous guidelines may be desirable, the area of human experimentation does not lend itself to simplistic answers. Even such basic concepts as "therapeutic" and "nontherapeutic" research, the terms "research" and "experimentation" themselves, "low" or "minimal" risk and "informed consent" need to be defined with new precision. Moreover, the trend toward deinstitutionalization of mentally handicapped individuals raises the question of the extent to which the protections afforded persons in traditional large institutions can or should be extended to those in other residential settings and to

159. *Report and Recommendations: Research Involving Children*, The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, DHEW Pub. No. (OS) 77-0004 (Washington, D.C.). See also the National Commission's recommendations on research involving prisoners, 42 F.R. 3075 (January 14, 1977), and the rules proposed by the Department of Health, Education, and Welfare, 43 F.R. 1049 (January 5, 1978). The Commission has also made recommendations in the area of psychosurgery. *Report and Recommendations: Psychosurgery*, DHEW Pub. No. (OS) 77-0001 (Washington, D.C.).

mentally handicapped individuals living in the community, including children enrolled in the public schools.

Because of the difficulty of these questions and the importance of balanced regulation in this area, the Task Panel feels that continued oversight and review is essential. In particular, for the reasons noted above, the functions of institutional review boards and other such monitoring bodies must be a primary focus of the ongoing review process.

11. *Civil Commitment*

Recommendation 1.

> *The civil commitment system as it exists in most States today should be drastically reformed. Responsible arguments can be made for modified abolition of civil commitment, for authorizing commitment only of "dangerous" persons or for time-limited involuntary commitment of persons who are mentally handicapped and also incompetent to make treatment decisions.*

Commentary:

Civil commitment involves a massive intrusion on personal liberty and autonomy. Compounding its risks is a record of widespread, well-documented and long-standing abuses. Therefore, the Panel believes, high priority must be given to reexamination and reform of the civil commitment system. The current system, in most States, lacks any consistent rationale, operates arbitrarily and capriciously at the whim of individual decisionmakers and can easily be used as an instrument of social control or as an expression of personal or societal animosity toward the person facing commitment.

Three basic arguments can be made: for abolishing commitment altogether, for restricting its use to instances where the likelihood of serious bodily injury is present, or for authorizing it in fairly broad instances by invoking the paternalistic power of the State. While the Panel feels that no civil commitment criterion should be broader than the one set forth under the third option ("safeguarded paternalism"), it also feels strongly that legal closure on the question of commitment criteria would not be premature and unwise.[160] These three basic options are discussed below:

160. A substantial number of Task Panel members were of the opinion that *if* appropriate modifications could be made in the criminal justice system to confine certain persons now found in the mental health system, they would personally support a "modified abolition" position. Even those Panel members, however, were reluctant at this point to recommend a single standard for adoption by all States.

(1) *Modified Abolition*

Under this option, civil commitment as it exists today would be virtually abolished; emergency confinement for a very brief period (*e.g.*, 48 hours) would be authorized for persons on the verge of or in the process of engaging in suicidal behavior.[161]

The rationale for the abolition of civil commitment is that involuntary detention (even when for purposes of "treatment") is incompatible with human and constitutional rights. People have the right to be different without risking involuntary detention because others disapprove of their way of life. This is not to deny that some people are unhappy, dissatisfied with their lives or unable to behave in ways which conform to community norms. Certainly, a full range of services (which should include mental health services) should be made available to such people (as to all people), but the option of whether or not to partake of any such services should remain with the individual. In many cases, people who today are subject to involuntary commitment have already had experiences with mental health care, and have determined that such care has not been helpful to them.

The "modified abolition" approach would recognize that paternalistic justifications for civil commitment typically fall prey to overbroad application and to circular reasoning ("the person is mentally ill and incompetent to make treatment decisions because he disputes the doctor's recommendation") and that public-protection (police power) justifications are undercut by the inability of mental health professionals to predict dangerousness accurately and by their well-documented tendency to err on the side of overpredicting dangerousness. Furthermore, there is a feeling that even in jurisdictions which technically authorize commitment only upon a showing of serious dangerousness, courts can and do distort the "dangerousness" criterion so as to justify commitment under a tacit standard of "in need of treatment."

Moreover, modified aboliton of civil commitment would not ignore real and serious mental health problems. The literature suggests that suicidal behavior can be as effectively thwarted by brief emergency intervention (which this approach would authorize) as by the far more intrusive device of ordinary commitment.[162]

The abolition of involuntary commitment would end the present subterfuge in which large (but unknown) numbers of patients who are

161. Arguments for the abolition of involuntary civil commitment have been set forth by, among others, Thomas Szasz. See, for example, *The Myth of Mental Illness* (1961) and *The Manufacture of Madness* (1970) for a detailed examination of the incompatibility of involuntary commitment with a free society.

162. See, e.g., Greenberg, "Involuntary Psychiatric Commitments to Prevent Suicide," 49 *N.Y.U. L. Rev.* 227 (1974).

technically on "voluntary" status are actually hospitalized against their will. Patients are quite commonly told that, unless they sign "voluntary" admission forms, they will be committed by the court and will end up spending even more time in the hospital.[163]

The most troubling matter with respect to abolition of involuntary commitment is the possibility that truly dangerous mentally disordered persons, who are permanently incompetent to stand trial on serious criminal charges or who are acquitted of such charges by the operation of the insanity defense, would have to be released and allowed to continue their criminal behavior. A "modified abolition" approach must take cognizance of such contingencies and must, through a restructuring of the criminal law or through partial reliance on the mental health system, guard against the immediate or indiscriminate release of such persons.

If public-protection (police power) civil commitments were generally abolished, the consequences to society would probably not be nearly as drastic as some would fear. First of all, since mental health professionals routinely overpredict dangerousness by gross margins, most persons now committed pursuant to the police power would, absent coercive intervention, probably not commit serious dangerous acts. The small number who would commit such acts would be subject to criminal prosecution. The majority of those would eventually be competent to stand trial and, given the restrictiveness of the insanity defense, might well be convicted. As other sections of this report urge, such persons should be able to receive mental health treatment on a voluntary basis within the correctional system.

It is possible, of course, that if police power commitments are eliminated or even sharply curtailed, the mentally disordered who were formerly committed may now be "criminalized" by being charged with relatively minor criminal offenses (disorderly conduct, disturbing the peace, trespass, etc.). However, such a result ought not to be presumed inevitable without empirical verification in jurisdictions which sharply curtail or virtually abolish their civil commitment systems. Moreover,

163. An unpublished study by E. Oliver Fowlkes, the director of the Mental Patients' Advocacy Project at Northampton (Mass.) State Hospital, indicates that approximately half of "voluntary" patients did not want to be in the hospital. Fowlkes also found, ironically, that involuntary patients were released after shorter hospital stays than were those who signed voluntary admission forms. Moreover, the later in the emergency "hold" period a patient signed a voluntary admission form (i.e., the more pressure brought to bear on him or her?) the longer was the stay. But compare Zwerling, I. *et al.*, "A Comparison of Voluntary and Involuntary Patients in a State Hospital," 45 *Am. J. Orthopsychiatry* pp. 81-87 (1975), in which the authors found upon a three month follow-up after admission that patients in involuntary status were more than twice as likely as those in voluntary status to have remained in the hospital (23.1% to 10.6% of their respective group). And see Gilboy and Schmidt, " 'Voluntary' Hospitalization of the Mentally Ill," 66 *Northwestern U.L. Rev.* 429 (1971), where the authors found that even patients denominated as "voluntary" were detained after they requested to leave the hospital.

even if such "criminalization" were to occur, it might still be preferable to the current system. The criminal courts provide stringent procedural protections, criminal sanctions are unlikely to be more severe than are current periods of civil confinement and application of the criminal sanctions in a sense encourages persons to take responsiblity for their own behavior.

It is also possible that, with limitation of police power commitments, persons now civilly committed pursuant to that power will be charged with criminal offenses and will then be offered the option of being "diverted" from the criminal system to the mental health system. As with "criminalization" in general, the rise of mental health diversion programs is a matter about which we now have little empirical evidence. As such programs begin, they will require careful scrutiny to ensure voluntariness and confidentiality. But if such conditions are ensured, diversion may be an acceptable—perhaps preferable—alternative to criminal conviction or to involuntary civil commitment.

(2) *"Dangerousness" as a Basis for Commitment*

A second option would be to authorize involuntary commitment only upon a showing of serious mental disorder coupled with a substantial likelihood that the proposed patient, if not committed, would in the near future cause or suffer death or serious bodily harm. To reduce overpredictions of dangerousness, such a standard would require a prediction of future dangerousness to be predicated upon a recent behavioral indicator (an overt act, an attempt or a serious threat) of the individual's propensity to do serious bodily harm to himself or to others.

The convergence of a variety of theoretical and pragmatic concerns makes it unlikely that society will in the near future opt for abolition—even modified abolition—of civil commitment. Society seems unwilling, for example, to permit distressed persons to take their own lives. Also, society seems unwilling to release persons who are mentally ill and demonstrably dangerous and who engage in criminal behavior but who, because of their incompetence to stand trial or because of the availability of the insanity defense, may be able to escape criminal confinement.

Thus, while these concerns might be dealt with as set forth above, the "dangerousness" approach, favored by many courts,[164] authorizes commitment only of persons found to be seriously mentally disordered

164. See, for example, *Lynch v. Baxley*, 386 *F. Supp.* 378 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 *F. Supp.* 1078 (E.D. Wis. 1972) (see footnote 126, Section III.8, for subsequent history.

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who, without commitment, are likely to cause or suffer serious bodily harm in the near future. Moreover, to reduce errors and aid in specificity—avoiding the arbitrariness that flows from vagueness—this approach requires that the proposed patient must have demonstrated dangerous potential in the recent past (through, *e.g.*, an overt act or attempt).

The "dangerousness" approach would avoid the above-mentioned circularity of more paternalistic standards and the slipperiness of a broad "in need of treatment" criterion, under which it has often been possible to accomplish the commitment of an individual simply because he is annoying, obnoxious, or different.[165] This option would also have the following advantages: the tightened commitment standard would ensure that the limited public mental health resources are expended on high priority cases; in view of the danger of overpredicting dangerousness, commitment would not be authorized to prevent societal risks less serious than death or serious bodily injury (*e.g.*, danger to *property*); overprediction of dangerousness would be further reduced by requiring, as some courts constitutionally mandate, that predictions of dangerousness be supported by evidence of recent overt acts.

(3) *"Safeguarded Paternalism"*

A third scheme for involuntary commitment might operate as follows: Commitment for a rather brief (*e.g.*, six-week) period could be authorized if it is established at a properly conducted hearing that the person suffers from a severe mental illness, reliably diagnosed (*e.g.*, a psychosis, an organic syndrome); the immediate prognosis is for major distress for the person if treatment is not forthcoming; treatment, likely to be effective, is available; and the risk/benefit ratio of treatment is such that a "reasonable person" would consent to it. At the expiration of the brief initial-commitment period, a new hearing would be required to extend the order for care for an additional period of the same length. At the end of a 6-12 week period, it would be evident in virtually all cases whether the period of involuntary commitment had in fact served the patient's best interests. If the patient had not profited from treatment and was unwilling to accept further treatment voluntarily, further involuntary treatment would probably not be advantageous. At that time the patient would be released.[166]

Contrary to the opinion that "dangerousness" should be the only condition for involuntary civil commitment, in some jurisdictions the need for care and treatment has been approved as a valid criterion for

165. See, generally, *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

166. See, e.g., Stone, *Mental Health and Law: A System in Transition*, DHEW Pub. No. (ADM) 75-176, U.S. Government Printing Office, Washington, D.C., 1975.

civil commitment.[167] The option set forth here would avoid some of the shortcomings of current "dangerousness" standards, such as the difficulty of predicting dangerous behavior and the tendency of some committing courts to pervert the standard in particular applications. Moreover, a "dangerousness" standard honestly applied could prevent commitment of many mentally ill persons who could profit from treatment but who may, because of their illness, be unable to understand their need for such treatment. This could be viewed as an undesirable result, in light of increasing evidence in recent studies that severe psychiatric illness can be reliably diagnosed[168] and that patients are helped rather than simply victimized by involuntary civil commitment.[169]

Recommendation 2.

> *(a) Whatever substantive commitment standard is adopted, evenhanded administration should be promoted by the use of specific definitions and criteria.*
>
> *(b) The Department of Health, Education, and Welfare should fund studies to ascertain the differential effects of commitment criteria in jurisdictions which have adopted different models of involuntary civil commitment.*

Commentary:

Whatever standard is ultimately adopted, the Panel feels strongly that corrective action should result in the adoption of statutory language which is pragmatically precise, *i.e.*, which describes with particularity the types of conditions and behaviors, if any, that can lead to loss of personal liberty. Only if this is done will there be any confidence that the commitment criteria are being administered in a fair and evenhanded fashion.

Courts and legislatures recently addressing questions of civil commitment have generally agreed that the commitment power must be circumscribed to some extent, but the debate over particular criteria remains heated. This is as it should be, since the question of involuntary commitment criteria involves not only legal considerations, but also ethical and social judgments as to the types of behavior society is (or should be) willing to tolerate.

It is most important, however, that the ongoing dialogue be informed by empirical studies of how different commitment criteria are

167. See, for example, *Fhagen v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied*, 409 U.S. 845 (1972).

168. Helzer et al., "Reliability of Psychiatric Diagnosis II: The Test/Retest Reliability of Diagnostic Classification," 34 Archives of General Psychiatry 136, 141 (1977).

169. See, for example, Gove and Fain, "A Comparison of Voluntary and Committed Psychiatric Patients," 34 Archives of General Psychiatry 669-676 (1977).

operating in various States. HEW should (through NIMH or other appropriate branches) fund such studies, perhaps paying particular attention to States that have rather recently revised their commitment codes (*e.g.*, Iowa, Michigan, Ohio, Pennsylvania, Wisconsin).

Recommendation 3.

Voluntary mental health and supportive services should be made easily available to those who seek them.

Commentary:

Any limitations on involuntary mental health treatment ought to be accompanied by an expansion of opportunities for truly voluntary care and services provided in appropriate settings. Just as States should not force confinement and treatment on persons who neither need nor want such "help," so they should facilitate provision of appropriate services to persons who voluntarily seek assistance.

Recommendation 4.

(a) Commitment procedures should be adopted to ensure fair resolution of the issues at stake.

(b) Procedural protections should include, but not necessarily be limited to, initial screening of potential commitment cases by mental health agencies, a prompt commitment hearing preceded by adequate notice to interested parties, the right to retained or assigned counsel, the right to a retained or assigned independent mental health evaluator, a transcript of the proceedings, application of the principle of the least restrictive alternative, a relatively stringent standard of proof (at least "clear and convincing" evidence), durational limits on confinement (with the ability of a court to specify a period of confinement short of the statutory maximum) and the right to an expedited appeal. At the commitment hearing, the rules of evidence shall apply and the respondent should have the right to wear his own clothing, to present evidence and to subpoena and cross-examine witnesses. Ideally, the petitioner should also be represented by counsel.

Commentary:

Both due process considerations and sound social policy dictate that commitment—with its massive intrusion on liberty and autonomy—should be authorized only if fair procedures are employed to resolve the major issues. Several courts have held many of the procedures

recommended above to be constitutionally compelled.[170] Certain other of the above procedures (such as initial screening by mental health agencies to divert certain persons from the commitment process and to direct them to services more suitable to their needs) have been required by recent legislation.

Moreover, at this stage of our psychiatric and jurisprudential history the recommended rights can hardly be viewed as controversial. Indeed, the rights to a prompt hearing, to counsel, to an independent evaluator and to durational limits on confinement (the necessity for periodic review) were supported several years ago in a position statement published by the American Psychiatric Association.[171] Still, there remains considerable laxity in actually according those rights to proposed patients. The Panel feels strongly that these procedural protections should be provided without delay and that whatever costs may be involved in securing such protections should not detract from funds currently available for mental health services.

Many Panel members believe that these same procedural protections ought to be afforded by statute to minors as well as adults, and that so called "voluntary" commitments of minors by their parents ought not to be permitted. Evidence suggests that while institutionalization may be appropriate and necessary for some children, for others it has been used by parents either punitively or because they are unaware of any alternatives and by the State for similar reasons. Whether these due process protections are required as a matter of constitutional law is presently before the Supreme Court in *Parham* v. *J.L. and J.R.*[172]

Explicit criteria and procedural protections should also be available for children in State custody as a result of court or parental action, who are placed in residential settings other than mental hospitals. Increasingly, mentally handicapped children are not only committed to mental hospitals, they are placed out of their homes in foster care and group settings, either under the auspices of the child welfare system or through purchase of service contracts negotiated by mental health departments. This trend is likely to continue and become stronger as the obligation to place the child in the least restrictive setting and the pressures for deinstitutionalization increase.[173]

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170. See, for example, *Lessard v. Schmidt*, 349 *F. Supp.* 1078 (E.D. Wis. 1972) (subsequent history omitted).

171. 128 *Am. J. Psychiatry* 1480 (1972).

172. *Parham v. J.L. and J.R.*, 412 *F. Supp.* 112 (M.D. Ga. 1976). The case was argued on appeal to the United States Supreme Court in the fall of 1977 and has recently been set for reargument.

173. See *Children Without Homes: An Examination of Public Responsibility to Children in Out of Home Care*, the Children's Defense Fund, 1977.

Children placed in these alternate settings are no less in need of a strong protective framework. For many of them, particularly when the placement is through child welfare, custody is typically transferred to the State, either on a temporary or permanent basis. In the former instance, parents retain residual rights but are often effectively cut off from making decisions about their children by the policies and practices of public agencies. Other children lack concerned parents and linger, without stability and permanence, in out-of-home care. Therefore, both as a matter of policy and legality it is important that these children too be protected by access to counsel, required periodic and dispositional reviews, placement only if absolutely necessary—in the least restrictive setting and in as close proximity as possible to he child's own home—and by requirements for efforts to ensure that children who cannot be reunited with their natural families are placed with permanent families through adoption, if at all possible, regardless of the child's handicapping condition. To this end, no Federal funds should be made available to the States for out-of-home care of mentally handicapped children unless these protections are afforded.

12. *Mental Health Issues Affecting Persons Accused or Convicted of Crimes*

Recommendation 1.

Mental Health Services to Prisoners

(a) Mentally handicapped persons incarcerated in jails and prisons should have reasonable access to quality mental health services which are delivered on a truly voluntary basis with confidentiality comparable to that which exists in private care. This can occur only if participation in treatment is unrelated to release considerations. Medicaid reimbursement should be extended to include voluntary jail and prison mental health care.

(b) In order for mental health services to be truly voluntary and optimally effective, prisons must first establish minimally adequate physical and psychological environments. The Department of Justice should place a high priority on allocating Federal grant funds to the improvement of prison living conditions.

(c) Prisoners from racial or ethnic minority groups should have access to mental health professionals from similar backgrounds.

(d) If a mentally handicapped prisoner is transferred involuntarily from a prison to a mental hospital, the involuntary transfer should be preceded by procedural protections equivalent to those available in ordinary civil commitment. Indeed, such "commit-

ment-like" procedures should be followed even before a prisoner receives involuntary mental health treatment within a correctional institution itself.

(e) In cases where a mentally handicapped prisoner desires mental heath treatment and where mental health and correctional authorities concur that a hospital setting would be appropriate and beneficial to the prisoner, procedures should be developed for effectuating a voluntary hospital admission. The prisoner's good-time and parole opportunities ought not to be jeopardized by the transfer—in fact, good-time and parole opportunities should not be jeopardized even for involuntarily committed prisoners.

(f)(1) Mental health professionals, as a general rule, should decline to provide predictions of future criminal behavior for use in sentencing or parole decisions regarding individual offenders.

(2) If a mental health professional decides that it is appropriate in a given case to provide a prediction of future criminal behavior, s/he should clearly specify:

(a) The acts being predicted;

(b) The estimated probability that these acts will occur in a given time period; and

(c) The factors on which the predictive judgment is based.

Commentary:

One recent study[174] has estimated that 37 percent of jail inmates in five California counties suffered from a mental disorder. Excluding those with personality disorders (20.9 percent) and mental retardation (.5 percent), 16 percent of all jail inmates would still be judged to have psychotic or nonpsychotic disorders. Another well-known study[175] found that 9.5 percent of the prison population nationwide was mentally retarded. Thus, research makes clear that a high percentage of jail and prison inmates (markedly higher than that in the nonprison population) is mentally handicapped. In light of these studies, each State should conduct a mental health survey among city and county jail inmates and State and Federal prisoners to determine incidence/prevalence rates and need for service.

174. Arthur Bolton Associates, "A Study of the Need for and Availability of Mental Health Services for Mentally Disabled Jail Inmates and Juveniles in Detention Facilities," prepared for the California Department of Health, October 1976.

175. Brown and Courtless, "The Mentally Retarded in Penal and Correctional Institutions," 124 *Am. J. Psychiatry* 1164 (1968).

Recent research also reveals that an appalling level of physical and sexual abuse often characterizes prison life. Meaningful mental health services cannot be delivered to mentally handicapped persons in prisons until the basic physical and psychological improvement of prisons has enforced minimal standards of human dignity and self-respect. After adequate living conditions in prisons are specified, the question of providing minimum standards for the provision of mental health services in prisons becomes valid.

Medicaid does not reimburse health or mental health services provided to prisoners or inmates of Federal, State or local correctional institutions. In order to make it possible for prisoners to receive mental health services that they desire, or to continue in therapy that had been initiated prior to incarceration, statutory changes should be made so that Medicaid can reimburse for those services requested by a prisoner.

Access to services on a voluntary basis (*i.e.*, whether or not the inmate enters treatment has no effect on parole-release date or on in-prison benefits) and in a confidential manner is essential to avoid a coerced participation which will undermine useful treatment. It has been estimated on the basis of the study cited above that 42 percent of the approximately 3,000 mentally disordered Mexican-Americans booked into jail in a given year in Los Angeles County speak only or mainly Spanish. Yet not one of the 20 mental health professionals in the Los Angeles county jail is bilingual or bicultural. Therefore, even in a relatively progressive and comprehensive prison mental health system, such as that in Los Angeles County, Spanish-speaking inmates have no therapists available to them with relevant language or cultural background. One of the Panel's recommendations attempts to ameliorate this kind of problem by ensuring that mentally handicapped persons have access to therapists who speak their primary language and who understand their culture. In areas where there is a scarcity of bilingual/bicultural mental health professionals, recruitment efforts at local graduate/professional schools should be encouraged.

With regard to the issue of prison-to-hospital transfers, a number of cases have held that because of the possibility of mistake, stigma and a lengthier period of confinement, a prisoner who is to be involuntarily transferred to a mental hospital should first be granted a civil commitment-type hearing. Despite such constitutionally-grounded decisions, rooted also in sound social policy, some jurisdictions seemingly continue to effectuate such transfers unilaterally and summarily, treating the transfers as equivalents of mere administrative "placement and classification" decisions. The Panel believes that all jurisdictions should afford prisoners for whom forced hospitalization is sought pro-

cedures equivalent to those accorded nonprisoners undergoing civil commitment.

Indeed, to avoid circumvention of such safeguards simply by involuntarily treating prisoners *in a penal setting*, due process procedures should also be followed in certain other instances. When a prisoner is involuntarily transferred to a psychiatric unit of a prison, for example, or even when a prisoner is forcibly and intrusively treated without being transferred at all, the possibility of stigma, the adverse consequences of mistake, and the major change in the conditions of the inmate's confinement all point to the need for adequate procedural safeguards.[176]

When a mentally handicapped prisoner *desires* transfer to a mental hospital and mental health and prison authorities concur that such treatment would be beneficial, a number of unnecessary legal hurdles now serve as barriers to effective mental health care. In some jurisdictions, for example, voluntary admission for prisoners is simply unavailable, necessitating that the transfer occur, if at all, only through commitment. Because of the added stigma of commitment and because commitment may involve a lengthier period of confinement than simply serving a prison sentence, the unavailability of a voluntary procedure may discourage delivery of needed and appropriate mental health care.

Other legal disincentives to appropriate care involve laws, regulations or practices involving good-time credits and parole eligibility for prisoners who are voluntarily or involuntarily transferred to mental hospitals. Although the cases are now fortunately beginning to go the other way, the traditional situation denied prisoners good-time credits while they were hospitalized and denied them, merely because of their hospitalization, the opportunity to be paroled, *even* if the parole was conditioned upon the patient's remaining *in the hospital* until hospital authorities believed discharge into the community was warranted. Those practices, which are unjust and which serve as legal impediments to mental health care for prisoners, have been eradicated in some States by recent legislation or case law.[177] The Panel recommends that all States be encouraged to rid their laws of such access barriers.

Traditionally, predictions by mental health professionals concerning who will do future dangerous acts have been an important factor in parole decisions. The Panel rejects the argument that "somebody has to make these predictions" in determining sentence length, and that they

176. See Wexler, D., *Criminal Commitments and Dangerous Mental Patients*, pp. 57-58 (1976); Roth, L., "Correctional Psychiatry," (Chapter 30) *in* Petty, Curran, and McGarry (eds.), *Modern Legal Medicine and Forensic Science*, in press.

177. See Wexler, *supra*, at 58-61.

necessarily will be made at an even lower level of validity—or a higher level of bias—if mental health professionals "abdicate" their role as predictors of future crime.[178] While that is a risk with which one should be concerned, it is also possible that nobody will make predictions, and that the criminal justice system, deprived of the opportunity to pass off difficult ethical and policy questions as matters of scientific acumen, will begin to confront more honestly the value premises on which it goes about imposing prison sentences. As observors have noted:

> Whether the setting is a maximum-security prison or merely Juvenile Hall, the paradox is the same: the degree to which the offender has supposedly been reformed by these institutions is judged on the basis of his saying and doing the right things . . . . Reform when seen as something different from compliance inevitably becomes self-reflective . . . . This game is won by the "good actors": the only losers are those inmates who refuse to be reformed because they are too honest or angry to play the game . . . .[179]

The Panel makes this recommendation more for ethical than empirical reasons. The research suggests that the validity of psychological predictions of dangerous behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose the use of such predictions on the strictly empirical grounds that mental health professionals are not competent to make such judgments.[180] An analogous conclusion was reached by a Task Force of the American Psychiatric Association: "Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness'. Neither has any special psychiatric 'expertise' in this area been established."[181] Our position goes further. We suggest that even in the unlikely event that substantial improvements in the reprediction of criminal behavior were documented, there would still be reason to question the ethical appropriateness of extending an offender's sentence beyond what he "deserves" in order to achieve a utilitarian gain in public safety.[182] It is clear, however, that there are no facile answers to this most difficult question of ethics and public policy, especially when one takes into account "justice" to the potential victims of violent crime—who, like their offenders and unlike the legislators,

178. See American Psychological Association, *Task Force on Psychology and Criminal Justice*. Washington, D.C.: American Psychological Association, 1978.

179. Watzlawick, Weakland and Fisch, *Change: Principles of Problem Formation and Problem Resolution*, 1974, p. 69.

180. See Monahan, The prediction of violent criminal behavior: A methodical critique and prospectus. In National Research Council (Ed.) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*. Washington, D.C. National Academy of Sciences, 1978.

181. American Psychiatric Association. *Clinical Aspects of the Violent Individual*. Washington, D.C. American Psychiatric Association, 1974, p. 20.

182. von Hirsch, *Doing Justice: The Choice of Punishments* (1976).

judges and mental health professionals making decisions in the criminal justice system, are often poor and nonwhite.[183]

Because reasonable persons may disagree with the position we have adopted with regard to offering predictions for judical and parole board decisionmaking, we would urge those who do believe it ethical to participate in such decisions to be explicit about what information it is that they are providing. Others would then be in a position to evaluate more objectively the nature of the scientific contribution, and to draw their own policy conclusions.

Recommendation 2.

> *(a) Evaluations to determine whether a defendant is competent to stand trial should be performed promptly and should, if possible, be performed in the defendant's home community and on an outpatient basis. Outpatient dispositions should be considered in certain instances even for defendants found, after evaluation and hearing, to be incompetent to stand trial.*
>
> *(b) A defendant who, because of psychotropic medication, is able to understand the nature of the proceedings and to assist in his defense, should not automatically be deemed incompetent to stand trial simply because his satisfactory mental functioning is dependent upon the medication, and should have the option of going forward with his trial.*
>
> *(c) Recent proposals by legal commentators to abolish the incompetency plea (and to substitute for it a trial continuance and then a trial with enhanced defense protections) are deserving of further study.*
>
> *(d) At a minimum, the limitations imposed by* Jackson v. Indiana *upon the nature and duration of incompetency commitments ought to be acknowledged and enforced nationwide.*

Commentary:

Often, defendants alleged to be incompetent to stand trial have been automatically confined—sometimes to a maximum security institution—for a period of psychiatric evaluation that could last for 30 to 90 days or longer. However, recent studies have concluded that competency examinations can usually be conducted within a matter of days and that fully 70 percent of such evaluations can be conducted adequately on an outpatient basis.[184] Accordingly, to avoid unnecessary

183. Shah, Dangerousness: A paradigm for exploring some issues in law and psychology. *American Psychologist* (in press).

184. de Grazia, Diversion from the Criminal Process: the "Mental Health" Experiment. 6 *Conn. Law Rev.* 432, 436 (1974).

stigmatization, deprivation of liberty and expense, the Panel recommends that, so far as possible, such evaluations be conducted quickly, locally and without hospitalization.

Indeed, outpatient dispositions may sometimes be appropriate even for defendants finally adjudicated to be incompetent to stand trial. For example, an incompetent defendant with roots in the community who is charged with a nonviolent offense would profit clinically from outpatient therapy more than from an institutional environment.[185] Statutes and court rules relating to competency should, then, make room for outpatient dispositions of such persons.

The Panel's second recommendation in this area relates to—and rejects—the "rule" established in some jurisdictions or by some judges that "medically induced" competence is "artificial" competence and accordingly ought not to be treated as legal competence to stand trial. Courts following such an "automatic bar" rule insist that defendants be withdrawn from medication prior to trial. If the defendant's mental condition then deteriorates, he is again ruled incompetent and is again hospitalized. The automatic bar to trying defendants whose competence is medically induced has recently—and deservedly—been challenged as an unwise policy and as an unconstitutional practice.[186] Defendants whose competence has been restored by medication should have the option of proceeding with a trial to determine their guilt or innocence.

The Panel believes worthy of further study the recent proposal of Professor Robert Burt and Dean Norval Morris to abolish the incompetence doctrine. In its place, Burt and Morris would substitute a trial continuance of up to six months. If the accused does not regain competence within that period, Burt and Morris would require the State either to dismiss the charges or to bring the accused to trial with extra protections designed to compensate in part for his incompetency (*e.g.*, increased defense discovery rights and a heightened prosecutive burden of proof).[187]

Some of the current abuses of incompetency commitments would be eliminated simply by enforcement of the Supreme Court's decision in *Jackson* v. *Indiana*.[188] In *Jackson*, the Court said defendants found

185. See, for example, *People ex rel. Martin v. Stroyhorn*, 61 Ill. 2d 296 (1976).

186. See Winick, *Psychotropic Medication and Competence to Stand Trial*, 2 Am. Bar Foundation Research Journal 769 (1977).

187. Burt and Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. Chi. L. Rev. 66 (1972). While the Panel felt that the Burt/Morris proposal deserves serious study, there was no consensus on the issue of whether incompetent persons should be allowed to go to trial. Some Panel members felt that to allow an incompetent defendant to stand trial could raise serious due process questions and might be unconstitutional.

188. 406 U.S. 715 (1972).

incompetent to stand trial could not be committed indefinitely, but only for a period reasonably necessary to determine whether they could be restored to competency in the foreseeable future and, if so, for an additional period reasonably necessary for the restoration of such competence. Very few States have implemented this constitutional directive, with the result that incompetent defendants remain incarcerated for years without any resolution of the charges against them and without any hope of improvement in their mental condition. Enforcement of *Jackson*—by appropriate State legislation or perhaps as a condition of Law Enforcement Assistance Administration funding—would at least force States either to bring these defendants to trial or to take some other action to remove them from their legal limbo.

Recommendation 3.

(a) Laws authorizing the involuntary commitment of sexual psychopaths and other "special" offenders (such as "defective delinquents") should be repealed.

(b) Persons who are now being committed as sexual psychopaths or "special" offenders should instead be

(1) Processed through and treated in the criminal justice-correctional system, or

(2) Given the option whether to be treated within (i) the correctional system or (ii) a therapeutic system in which the period of confinement could not exceed the applicable criminal law maximum sentence.

Commentary:

There are two principal problems with current laws regarding the commitment of "special" offenders such as "sexual psychopaths" and "defective delinquents." First, such a commitment, unlike criminal confinement, is ordinarily for an indeterminate period. Second, the criteria for commitment—indeed, the very terms "sexual psychopath" and "defective delinquent"—are so vague as to make arbitrary whether a particular person will be processed through the "special" system or through the ordinary criminal system.

Three basic law-reform options have been proposed to deal with these problems. One is simply to apply the criminal law maximum sentences to offenders committed pursuant to special statutes. That option is not enthusiastically endorsed by the Panel, for while it would solve the length-of-confinement problem it fails to address the problem of arbitrary selection.

A second option would abolish special offender commitments and process such persons through the criminal justice system. That step

would, of course, negate both problems (indeterminate confinement and arbitrary selection) and would be acceptable if there were an accompanying upgrading of available mental health services in correctional facilities.

A third option would overcome indeterminate confinement problems and most selection problems without totally abolishing special treatment programs. It would require the maximum criminal sentence (or the sentence, if any, actually imposed on the offender) to apply both to correctional and therapeutic confinements. Problems of arbitrary selection would be largely overcome by giving the offender the option of therapeutic or penal placement.[189]

IV. Assuring Patients/Clients of Their Rights: Bills of Rights And Other Mechanisms

1. *Bills of Rights*

Recommendation 1.

The President's Commission should recommend to the legislatures of the individual States that legislation be enacted providing a "Bill of Rights" for all mentally handicapped persons, both those who are institutionalized and those residing in the community.

Commentary:

Following the seminal decision by Judge Frank Johnson in *Wyatt v. Stickney*,[190] approximately 14 States have enacted legislation establishing "bills of rights" for psychiatric patients[191] and 12 have promulgated similar legislation for mentally retarded persons.[192] These statutes reflect the specific standards established in *Wyatt* for treatment of mentally handicapped persons[193] and other judicial opinions that, in the words of the *Harvard Law Review*, "have sketched the outlines of a constitutional right to protection of bodily integrity from unwanted

189. See, generally, Wexler, *Criminal Commitments and Dangerous Mental Patients*, 33-38, 70 (1976).

190. 325 *F. Supp.* 781 (M.D. Ala. 1971), 334 *F. Supp.* 1341 (M.D. Ala. 1971), 344 *F. Supp.* 373 (M.D. Ala. 1972), 344 *F. Supp.* 387 (M.D. Ala. 1972), aff'd sub. nom. *Wyatt v. Aderholt*, 503 *F.*2d 1305 (5 Cir. 1974).

191. See "The *Wyatt* Standards: An Influential Force in State and Federal Rules," 28 *Hosp. & Commun. Psych.* 374 (1977).

192. American Bar Association Commission on the Mentally Disabled, draft unpublished document pertaining to the rights of institutionalized developmentally disabled persons, in progress. All States surveyed which have enacted a bill of rights for developmentally disabled persons have in place a bill of rights for the mentally ill; but some States which have enacted a bill of rights for the mentally ill have not enacted such a measure for the developmentally disabled.

193. 344 *F. Supp.* at 379-386; 344 *F. Supp.* at 395-407.

State intrusion."[194]

The need for such legislation should be self-evident: The extent of discrimination against mentally handicapped persons needs no lengthy recitation. The pattern of abuse, disenfranchisement and disregard[195] eloquently underscores the need for vigorous, enforceable, prophylactic legislation in each of the States. It should be pointed out that enactment of a "bill of rights" in no way consigns the mentally handicapped to "second class citizen" status. Rather, it is an acknowledgement of the historical fact that such persons have been perceived and treated as second class citizens—or worse—by much of society. Because of this history, prophylactic legislation is necessary.[196]

After analysis of several of the significant State enactments,[197] the Panel has concluded that an adequate bill of rights for mentally handicapped persons should include at least seven basic components:

(a) A statement that all mentally handicapped persons are entitled to the specified rights;

(b) A statement that rights cannot be abridged solely because of a person's handicap or because s/he is being treated (whether voluntarily or involuntarily);

(c) A declaration of the right to treatment, the right to refuse treatment and the regulation of treatment, the right to privacy and dignity, the right to a humane physical and psychological environment and the right to the least restrictive alternative setting for treatment;

(d) A statement of other, enumerated fundamental rights which may not be abridged or limited;

(e) A statement of other specified rights which may be altered or limited only under specific, limited circumstances;

(f) An enforcement provision; and

(g) A statement that handicapped persons retain the right to enforce their rights through *habeas corpus* and all other common law or statutory remedies.

A brief analysis follows.*

194. "Developments—Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190, 1345 (1974).

195. In the words of Patricia Wald, the handicapped person is perceived as "someone to whom attention need not be paid," Wald, "Basic Personal and Civil Rights," in Kindred *et al.*, eds., *The Mentally Retarded Citizen and the Law* 3, 18 (1976).

196. The analogy to the passage of the Civil Rights Act of 1964 and 1965 is probably a useful point of comparison in this regard.

197. See, *e.g.*, *N.J.S.A.* 30:4-24.1 *et seq.*; *Ariz. Rev. Stats.* § 36-504 *et seq.*; *Minn. Stat.* § 253A.17; *Fla. Stat.* § 394.459 *et seq.*; *Wis. Stat.* 51.61 *et seq.*

* We note that Federal regulations for Skilled Nursing Facilities and Intermediate Care Facilities, including ICF/MRs, contain a patient bill of rights. The same bill-of-rights context was

(a) The statute should explicitly state that every handicapped person is entitled to all rights set forth in the act and should retain all rights not specifically denied. But for its reference to "patient in treatment" (thus potentially limiting its applicability to institutionalized patients), the New Jersey provision could serve as a model for the draft statute.

> Every patient in treatment shall be entitled to all rights set forth in this act and shall retain all rights not specifically denied him under this Title. A notice of the rights set forth in this act shall be given to every patient within 5 days of his admission to treatment.[198]

(b) The statute should explicitly indicate that the fact that a person is receiving treatment or rehabilitative services cannot by itself justify deprivation of his or her civil rights. This section should specify that there may be no presumption of incompetency because a person has been examined, evaluated, treated or admitted to an institution. It should also specifically ban discrimination because of an individual's status as patient or resident. The kinds of rights to which persons remain entitled regardless of their status as patients include but are not limited to the right to register for and to vote at elections; rights relating to the granting, forfeiture, or denial of a license, permit, privilege, or benefit pursuant to any law; the right to dispose of property, the right to sue or be sued, and the right to obtain housing.[199]

(c) The statute should specify that all persons have a right to treatment in a humane physical and psychological environment, a right to freedom from harm, a right to refuse treatment and a right to the regulation of treatment procedures, a right to basic privacy and dignity and the right to the least restrictive setting for treatment. These rights and the right to be free from discrimination in education, employment, housing and other matters have been discussed in detail earlier in this report.

(d) The statute should also specify certain treatment rights and conditions of treatment rights which may not be denied under any circumstance—for example, all patients have the

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recently proposed for Federal regulations for general and psychiatric hospitals by Rep. William Cohen (R-Maine), but this amendment to statutorily provide for a bill of rights for patients in a Medicare or Medicaid provider facility was withdrawn prior to passage of recent amendments.

198. *N.J.S.A.* 30:4-24.2b.

199. For example, the draft statute might well combine language from the New Jersey and Arizona statutes as well as a portion of the *Wyatt* decision. See *N.J.S.A.* 30:4-24.2a and 24.2c, *Ariz. Rev. Stats.* 36-506, and *Wyatt*, 344 *F. Supp.*, above, at 379.

absolute rights (1) to be free from unnecessary or excessive medication, (2) not to be subjected to experimental research, shock treatment, psychosurgery, or sterilization, without their express and informed consent after consultation with counsel or an interested party of their choice, (3) to be free from physical restraint and isolation and (4) to be free from corporal punishment.[200] In addition to the above rights, at a minimum patients and residents should have the absolute right to correspond with public officials, attorneys, clergymen and to the appropriate advocacy office[201] and the absolute right to religious freedom.[202]

(e) The statute should also specify other environmental and conditional rights guaranteed to all patients which can only be abridged in specific situations for a limited time and subject to an independent, neutral review mechanism. Thus, the New Jersey law, for example, provides the full panoply of *Wyatt*[203] rights: privacy and dignity, use and wearing of personal possessions and clothes, use of personal money, individual private storage space, daily visitors, reasonable access to telephones, access to letter-writing materials and uncensored correspondence, regular physical exercise, outdoor visitation, interaction with the opposite sex, freedom of religion and adequate medical treatment.[204] Further, the statute should stipulate that patients have the right to control their own assets[205] and the right to compensation for work done.[206]

Many of these rights have already been the subject of discrete court litigation.[207] Nonetheless the Panel feels that they are of such significance that they should be statutorily mandated.

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200. See, for example, *N.J.S.A.* 30:4-24.2d (1) through (4).

201. See *N.Y. Mental Hygiene Law* § 15.05(a); see also, 50 *Penn. Stat.* § 4423(1); *Minn. Stat.* § 253A.17(2).

202. See, *e.g.*, 50 *Penn. Stat.* § 4423(2); *Ariz. Rev. Stats.* § 36-514(4).

203. See *e.g.*, *Wyatt*, 344 *F. Supp.*, above, at 380-381.

204. See *N.J.S.A.* 30:4-24.2e(1) and (3) through (12).

205. See, for example, *Vecchione v. Wohlgemuth*, 377 *F. Supp.* 1361, 1369 (E.D. Pa. 1974), further proceedings 426 *F. Supp.* 1297 (E.D. Pa. 1977), aff'd. 588 *F.*2d 150 (3 Cir. 1977), *cert. den. sub. nom. Beal v. Vecchione*, — U.S. —, 98 S. Ct. 439 (1977); and *Board of Chosen Freeholders of Hudson County v. Connell*, Civ. No. 83870, 9 *Clearinghouse Rev.* 585 (N.J. Hudson Cty. Ct. 1975), 9 *Clearinghouse Rev.* 732 (N.J. Hudson Cty. Ct. 1976).

206. See, for example, *Souder v. Brennan*, 367 *F. Supp.* 808 (D.D.C. 1973); *Ariz. Rev. Stats.* § 36-510; *N.Y. Mental Hygiene Law* § 15.09.

207. See, for example, *Schmidt v. Schubert*, 422 *F. Supp.* 57, 58 (E.D. Wis. 1976) (visitation policy); *Brown v. Schubert*, 347 *F. Supp.* 1232, 1234 (E.D. Wis. 1972), supplemented 389 *F. Supp.* 281, 283-284 (E.D. Wis. 1975) (right to send mail); *Gerrard v. Blackmun*, 401 *F. Supp.* 1180, 1193 (N.D. Ill. 1975) (right to private communications with counsel); *Winters v. Miller*, 446 *F.*2d 65, 69-71 (2 Cir. 1971) (freedom of religion); *Carroll v. Cobb*, 139 N.J. Super. 439, 354 A.2d 355 (App. Div. 1976) (right to register to vote).

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(f) The statute should contain a strong enforcement provision. None of the existing statutes includes such a section; the only step toward such a mechanism is the absolute right to a hearing, built into the New Jersey law, in the case of experimental research and similar treatments in matters involving persons adjudicated incompetent.[208] Optimally, there should be a grievance mechanism comporting with procedural due process, appointment of counsel and an automatic hearing procedure established in the case of denial of any of the rights enumerated in a draft bill.

Regardless of the specific enforcement provision adopted, the Panel feels that a strong, vigorous, independent advocacy system is absolutely mandatory to represent and advise patients at all stages of their institutionalization and on all other matters discussed in this recommendation.[209] It would not be an overstatement to suggest that any "bill of rights" would be meaningless to patients without such an advocacy system.

(g) The statute should include language similar to the following:

> Any individual subject to this Title shall be entitled to a writ of habeas corpus upon proper petition by himself, by a relative, or a friend to any court of competent jurisdiction in the county in which he is detained and shall further be entitled to enforce any of the rights herein stated by civil action or other remedies otherwise available by common law or statute.[210]

Although the statutory sections are not complete, they are useful as a model for a bill which can be recommended for endorsement and ultimate enactment. Endorsement of such a bill by the President's Commission on Mental Health would help to ensure "equal access to justice" for mentally handicapped persons.[211, 212]

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208. See *N.J.S.A.* 30:4-24. 2d(2).

209. As indicated in the section on "advocacy," above, it is essential that patients and former patients have input into both the advocacy system and suggested draft legislation.

210. N.J.S.A. 30:4-24.2h.

211. Herr, *Advocacy Under the Developmental Disabilities Act* 88 (1976).

212. It has also been suggested that consideration be given to amending Federal law to make future Medicaid/Medicare certification and other third party payment mechanisms contingent upon individual State adoption and implementation of approved "bills of rights."

We note here that the Federal government can play a direct role in fashioning bills of rights, through administrative directive, regulation, or statute, for patients in Veterans' Administration facilities, and we suggest that the Commission give consideration to such a mechanism. The *Wyatt* Standards could, in the absence of a State bill of rights, serve as a guide for minimally adequate standards. Should the State have enacted or should it subsequently enact a bill of rights with standards higher than those in the VA bill of rights, the higher State standards would prevail.

Recommendation 2.

The President's Commission should recommend to the States that all currently existing laws establishing rights of patients, of persons in treatment and of residents of hospitals, facilities for the retarded or similar institutions should be prominently displayed in all living areas, wards, hallways and other common areas of all such facilities, and should be incorporated into all staff-training and staff-orientation programs as well as in educational programs directed to patients, staff, families and the general public. Explanation of rights to patients should be clearly and simply stated and in a language the patient understands; the explanation should be read to any patient who cannot read.

Commentary:

If there is any expectation that the rights in question will be enforced, it is absolutely necessary that patients and residents be apprised of them and that treatment staff be made aware of them and their significance.[213] This recommendation is a modest first step towards that goal.

It also follows that recognition of rights precedes enforcement and that therefore the education of all citizens as to their rights is imperative. Specifically, persons receiving mental health services and, where appropriate, their guardians, should be informed of the rights they have and of all possible methods of enforcement. Further public information to inform the general population of the rights of mentally handicapped citizens could eliminate some old myths and lead to a better climate in which these rights could be enjoyed.

2. *National Initiatives in Legal and Ethical Issues*

Recommendation 1.

NIMH and other appropriate HEW components should establish special offices concerned with legal issues affecting the mentally ill and the developmentally disabled, respectively. These offices should be charged with (1) keeping the staff of NIMH and HEW informed about legal and ethical issues affecting mentally handicapped persons, (2) providing continuing advice from that perspective on program and policy issues, (3) promoting advocacy on behalf of the mentally handicapped, (4) promot-

213. See, for example, for a discussion of the lower level of staff comprehension of patients' rights, Laves and Cohen, "A Preliminary Investigation Into the Knowledge and Attitude Toward the Legal Rights of Mental Patients," 1 *J. Psych. & L.* 49 (1973). See also *N.J.S.A.* 30:4-24.2b.

ing attention to legal issues in Federal programs for the mentally handicapped, and (5) promoting interdisciplinary exchange.

Commentary:

There is at present no real focus at the Federal level on how legal and ethical issues relate to program and service issues as they affect programs and planning at the national level. While a support center in mental health law at the Legal Services Corporation or other efforts to stimulate legal advocacy will develop heightened sensitivity to mental health and law issues in the bar, it is also necessary to introduce a concern for legal and ethical issues directly into the Federal process. Accordingly, offices staffed by qualified lawyers and lay advocates and given direct access to top administrators should be established at NIMH and at various components of HEW charged with delivering, developing or monitoring services for mentally or developmentally disabled persons. The functions of such offices would include analyzing new legal cases, legislation and other relevant developments and disseminating such information inside and outside HEW; assisting HEW staff and the public in developing training and research projects aimed at enhancing awareness of legal and ethical issues and bettering our understanding of the interrelationship between legal and ethical issues and program and service issues; identifying for the leadership of HEW policy issues arising from legal developments and the options for response to such developments; and monitoring State compliance with required advocacy systems.

Recommendation 2.

NIMH and other appropriate HEW components should fund innovative programs at law schools and mental health professional schools or other appropriate institutions which are designed to develop persons with policy, administrative and direct-service responsibilities in both the mental health and the legal system who will be knowledgeable about the delivery of services and the legal and ethical issues involved with patient care. Financial support should also be given for innovative in-service training programs at service facilities which are designed to provide continuing education for service providers concerning legal and ethical rights and for training projects for lawyers, judges, and non-lawyer advocates. These agencies should also support research into legal and ethical issues and problems, such as those highlighted in this report.

Commentary:

In that virtually all program, service, prevention and research initiatives in the mental health area will raise important legal and ethical issues, it is important to begin to develop practitioners and teachers in each profession who possess the necessary conceptual knowledge of the other and who have the practical skills required to foster interdisciplinary collaboration for the benefit of mentally disabled persons. The recent development of mental health law as a specialty within the legal profession has generated a wide range of judicial actions and legislative reforms. New "rights" established by the courts, along with protections and entitlements under Federal and State laws and regulations, have profound effects upon the administration and delivery of mental health services, both in institutional and community settings. Lawyers and treatment professionals today find themselves increasingly in a novel, often conflicting relationship in their separate efforts to improve their clients' access to suitable services, consistent with protection of rights. A strong need for cross-disciplinary planning, administration and service delivery exists, but there is an acute scarcity of both legal and mental health professionals with the necessary depth of understanding of the sensitive issues at the intersection of their disciplines, and there is a need for comprehensive training programs in professional schools, and law schools, as well as in-service training programs, to alleviate such a shortage.

Many Federal training programs have focused on the training of mental disability service providers, both professional and non-professional. Only a very few isolated projects have trained lawyers or judges, despite their growing impact on the lives of mentally disabled clients. Our earlier recommendations on advocacy addressed the need for the Legal Services Corporation to provide backup support and training for Legal Services lawyers in the special problems of the mentally disabled and for similar LEAA support for training of public defenders in representing the mentally disabled in the criminal justice system. To complement these efforts, support should be made available through HEW for the training of lawyers who do not fit into the Legal Services or public defender systems, judges and nonlawyer advocates.

HEW should also encourage and fund research on law and mental health issues, the training of researchers to assure the conduct of quality research and evaluation of the various approaches undertaken.

V. Ethics

As will have been observed, there are ethical dimensions to virtually all of the legal-rights issues generating the recommendations made

in this report. Obviously, ethical concerns may extend far beyond legal analysis into areas where there are no laws (e.g., an ethical obligation to be a good Samaritan) or may even conflict with what is currently the law (e.g., conscientious objection). One's legal obligations derive strictly from constitutional, statutory or regulatory pronouncements, but one's ethical obligations have no such clear moorings. There is always (ultimately) a "yes" or "no" answer to the question of whether actions are in violation of the law. But for moral problems involving a conflict among values, resolution must depend upon discussion and consensus.

In previous sections of this report, ethical dimensions have been mentioned along with the discussion of legal rights. Where the Panel felt that the ethical resolution of a problem was clear, its recommendations have been noted. Obviously, where there is agreement about moral problems in mental health, what is needed is not so much further moral reasoning as the application of public opinion and other social strategies to increase accountability and reduce abuse. Where the Panel did not reach consensus on eithical issues, an attempt has been made to clarify the conflicts involved.

This section looks back over the full range of issues in an effort to highlight the interweaving of ethical problems throughout the field of mental health. At the same time, we attempt to provide a structure for thinking about such issues, because discussions of ethics and mental health frequently enumerate problems (e.g., issues raised by human experimentation, psychosurgery, breach of confidentiality) unsystematically without putting them in proper perspective or establishing a framework for their constructive discussion.

The time is ripe to address these issues because:

(a) Technologies in mental health matters may, in the future, permit more systematic modification of individual and group behavior.[214]

(b) Technology is permitting increased capacity for mental health information exchange, thus compromising personal privacy.[215]

(c) In today's society individuals are increasingly interdependent.

214. See generally, London P., Behavior Control. New York: Harper & Row, Inc., 1969. See final report, A Comprehensive Study of the Ethical, Legal, and Social Implications of Advances in Biomedical and Behavioral Research and Technology. Study conducted for the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, New Jersey Institute of Technology and Policy Research, Inc., 1977.

215. See generally Personal Privacy in an Information Society. The Report of the Privacy Protection Study Commission. Washington: USGPO, 1977.

(d) There is a growing appreciation of our diminishing resources—natural and perhaps even personal. Demands for resource allocation will only escalate.[216]

The above factors may in the future make it difficult for society to appreciate the value of persons otherwise deemed marginal, unproductive, different or even "dangerous." A technological, "high risk," interdependent society, striving to maximize its resources, may be understandably reluctant to leave people alone.[217]

The following schema is proposed as an initial conceptualization for thinking about ethical problems in mental health care. While there is some overlap, most ethical problems in mental health care may reasonably be placed into one of four areas. The choices in each area impact upon other areas. More importantly, the choices impact upon the role of the mental health system vis-à-vis society. The problems in each area are briefly discussed below.

A. *Needs of Patients/Clients Versus Needs of Families Versus Needs of Society*

1. The "Double-Agent" Problem

No question arises more frequently in discussions of the ethics of mental health intervention than "Who is the client?" Often, the question is asked rhetorically, for any attempt to answer it is dismissed as a "value preference." Ethical considerations are especially complex when the individual's behavior is sufficiently uncontrollable or dangerous to justify confinement under either criminal or civil law. In such circumstances, there may be conflicts between the individual's values and behavioral goals and those of the society which has committed him. The mental health professional employed by a mental hospital or prison may be uncertain as to where his primary responsibilities lie—with a particular mental patient or prisoner, with the administration of the institution which pays his salary or with the community at large. When mental health professionals do try seriously to articulate who their client is—where their loyalties are given—they sometimes appear constrained to a multiple-choice answer, with the alternatives being (a) the "system" (or "society"), (b) the family and (c) the individual.

216. See generally Hiatt H.H., Protecting the medical commons: who is reasponsible? N. Eng. J. Med. 293:235-241, 1975.

217. See, e.g., remarks of Lesse S., in *Looking to the year 2000*—out: today-oriented psychiatry—in: prophylactic psycho-bio-sociology, Frontiers of Psychiatry 4(18): 1, 2, 11, Nov. 1, 1974.

Yet there is no need to hang on the horns of this dilemma, because "Who is the client"? is not a multiple-choice question. It requires an essay answer.

For example, *both* the individual and society may be the clients of the mental health professional, but *in different roles and with varying priorities.* Mental health professionals may be full-time employees or "client-centered" or "consultee-centered" or "program-centered" consultants for prisons, industry, the military or schools.[218]

The needs of a particular organization may legitimately be different from the needs of the individual. The treatment, management or dispositon of persons within the system may be mainly for the purposes of accomplishing its mission (e.g., "preserve the fighting force") or, in a utilitarian fashion, for the greatest good for the greatest number of persons within the organization, rather than for the individual.

"Double-agentry" poses several potential ethical problems.[219] To the extent that patients or clients are uninformed of the therapist's mixed allegiances, they may bring false expectations to the treatment situation; they may be subject to unknowing harm rather than help through contact with the mental health professional. Such "double-agentry" which confounds the role of the treating professional may also discourage care-seeking behavior among those in need. The type of treatment given may be subsumed to overriding administrative considerations.

The problems posed in this area suggest some "solutions." The mental health professional must be informed and knowledgeable about the role s/he is expected to play within the organization. The patient/client should be similarly informed prior to beginning a treatment or "evaluation" relationship. Wherever possible "administrative-therapist" splits should be encouraged. Administrative, "dispositional" or consultation functions to the system, which are legitimate and useful (e.g., mental status evaluation for parole or in connection with an incompetency proceeding), should be provided by mental health profes-

218. See, e.g. Hussey H.H., Psychiatry in Military Services (editorial), Journal of American Medical Association 228:203-204, (1974), Roth L.H., Correctional Psychiatry, Chapter 30 in Modern Legal Medicine and Forensic Science, Petty, C.S. Curran, W.J., McGarry, A.L. (eds.) (In press).

219. See, generally, Shestack, J.J., Psychiatry and the Dilemmas of Dual Loyalties, American Bar Association Journal 6: 1521-1524, 1974.

sionals who occupy no therapeutic role within the organization.[220]

But even given foreknowledge and an administrative/therapist split, some mental health practices may be *per se* unethical. For example, it has been suggested that removing "character-behavior" diagnoses as a sufficient ground for discharge from the military may be ethically required.[221] This is not to argue that the military should be forbidden to catalogue and thoroughly describe a man's behaviors which justify his administrative separation from the military.

In the role of a therapist providing treatment for an individual who wants to change his or her behavior, the professional must be primarily the agent of the individual. This would mean that therapy should only be given on a truly voluntary basis and that it should not be used as a means to pursue societal ends. But even this approach involves priorities rather than an absolute role prescription; in a limited number of defined situations allegiances must be reordered—for example, when a patient in therapy clearly indicates that a life-threatening act is imminent.

The question of where the mental health professionals' loyalties lie arises most often in the context of concerns for the confidentiality of information. While confidentiality dilemmas—which are only one manifestation of the larger issue of the professional's loyalties—are acute in some areas, such as in the criminal justice system, they appear to be a growing concern to all mental health professionals who engage in treatment.

Complicated issues arise when families request information concerning their disturbed members—information that may have been given in confidence. Requirements of peer review and third-party reimbursement (necessary for maintaining standards and in fairness to taxpayers who ultimately "pay the bill") pose other "legitimate" incursions into transactions that might ideally be wholly private.[222]

220. See e.g. Powledge F., The Therapist as Double Agent, Psychology Today, July 1977, pp. 44-48; McDonald M., The Ethics of Psychiatry, Psychiatric News, July 15, 1977, pp. 1, 7, 21.

221. Hussey, 1974, above.

222. See, generally, Record Keeping in the Medical-Care Relationship, Chapter 7 in Personal Privacy in an Information Society, 1977 (above); see, Confidentiality, A Report of the 1974 Conference on Confidentiality of Health Records, American Psychiatric Association, 1974.

Some balancing of individual versus family versus societal rights is again required. The limits of confidentiality in a therapeutic relationship must be specified beforehand. The crucial "minimal standard" in addressing confidentiality, as in addressing other dilemmas of loyalty, is that all parties with a claim on the professionals' loyalty be fully informed in advance of the existence of confidentiality, or lack of it, and of any circumstances which may trigger an exception to the agreed-upon priorities. The individual being evaluated or treated then has the option of deciding what information s/he is willing to reveal and what risks to confidentiality s/he is willing to bear.

2. Forced Treatment

Individuals may be isolated, treated or "changed" because they are "dangerous" to society or in order to lessen societal costs of their deviant behavior. Philosophical and ethical arguments may serve either to defend or to circumscribe these practices.[223]

The consensus of our Panel is that it is clearly unacceptable that mental health professionals and mental health concepts be used to suppress political dissent.[224] However, another treatment issue of more common concern is the locus of care and/or treatment, which may not be for the maximum benefit of the person but may be more suited to the needs of family members or even seemingly demanded by the community.[225] Is it moral for society or a family to force a mentally disturbed member who is dangerously aggressive to undergo a behavior modification program or take a tranquilizing drug? Does it make a difference if the mentally disturbed person is either competent or incompetent?

While there is no consensus on the ethical "solutions" to these problems of forced treatment, some approaches may be recommended to lessen tensions and to increase alternatives. When there is family dissension, when the thera-

223. See Robinson D.N., Harm, Offense, and Nuisance, Some First Steps in the Establishment of an Ethics of Treatment, American Psychologist 29:233-238 1974; Shapiro M.H., Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, Southern California Law Review 47:237, 356, 1974.

224. See discussion of Soviet abuse of psychiatry, the collaboration of psychiatrists and the state in the hospitalization of possibly nonmentally ill persons, in Robinson R.L. World Congress Condemns Abuse, Psychiatric News, Oct. 7, 1977, pp. 1, 8, 19.

225. See e.g. Rachlin, S., Pam, A., Milton, J., Civil Liberties versus Involuntary Hospitalization, American Journal of Psychiatry 132: 189-192, 1975.

pist's activities may benefit some members of the family but not others, the therapist can attempt to secure a "contract" for treatment of the whole unit. This approach places some burden upon the family as well as upon the therapist to balance out the needs of differing individuals. Strengthening of community support systems and aid to families generally (financial and personal) may ease their burden in caring for the mentally disabled. Assuming intervention is needed, the principle of the "least restrictive alternative" should be respected. Finally, in the absence of legal incompetence to consent or its equivalent, the right to refuse treatment should be afforded patients whenever possible.

3. Nontherapeutic Research

Despite some risks, nontherapeutic research will undoubtedly continue to be conducted with mental health patients or clients. As described in the section on experimentation, nontherapeutic research is not for the subject's immediate good but because of legitimate needs for society to advance knowledge and on behalf of future patients.[226] The ethical justification for nontherapeutic research is, however, most clear when the experimentation relates to the condition from which the patient/client suffers.[227] However, the nonpatient population must also bear its brunt of the cost of new knowlege.[228]

B. *Legitimate Uses of Mental Health Knowledge*

1. The Ethics of Intervention

When interventions take place in the absence of available knowledge or without adequate available resources or without full consideration of the risks and benefits of intervening, ethical issues are generated. The complex ethical issues emanating from the EPSDT intervention program are illustrative—is identification of children at risk justified if no special services are forthcoming? How

226. See Goodwin F.K., On Behalf of Brown B.S., Statement to the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1976, p. 2; see generally, Curran W.J., Current Legal Issues in Clinical Investigation, with Particular Attention to the Balance Between the Rights of the Individual and the Needs in Society, in Ethics in Medicine, 1977 (above), pp. 296-301.

227. See Jonas H. Philosophical Reflections on Experimenting with Human Subjects, in Ethics in Medicine, 1977 (above), pp. 304-315.

228. See e.g. McCormick R.A., Experimental Subjects, Who Should They Be? Journal of the American Medical Association: 235:2197, 1976.

should the risk of unnecessary alarm to parents be balanced against the increased knowledge which would be conveyed by making available to them the results of screening? Should screening devices be used if there is a danger of cultural bias, with consequent mislabeling and stigma? How should the need for data be weighed against the interest in privacy?[229]

While to articulate these conflicts is by no means to rule out prevention or other intervention efforts, thoughtfulness is required.[230]

The point is that there *is* an ethics of intervention, with harm as well as benefit in the calculus. There should be no unexamined assumptions that the failure of present "therapeutic" efforts will be remedied only by more adequate "preventive" efforts. That which is experimental in intervention also requires evaluation. As in general health care, more empirically generated guidelines for prevention are necessary.[231]

2. Behavior Control

Mental health knowledge may be wanted for purposes of societal protection.[232] But knowledge developed secretly or expressly for nontherapeutic purposes impacts upon professional identities and roles. Such knowledge development may thus ultimately compromise the therapeutic effectiveness of professionals who work in normative settings (guilt by association). Considering past controversies concerning the appropriateness of biological warfare or the recent exposé of secret CIA experiments with hallucinogens, it may be questioned whether the development of mental health knowledge in no way intended for therapeutic purposes is ethical.

Concerning "behavior control"[233] more generally, the relevant issues overlap with those considered earlier under

229. See e.g. discussion in Chapter 7, Ethical and Legal Considerations, in Developmental Review in the EPSDT Program (Early and Periodic Screening, Diagnosis and Treatment Program), The American Association of Psychiatric Services for Children, Inc., 1977, pp. 32-45., and Early Screening Programs. Special Section on Developmental Assessment. American Journal of Orthopsychiatry Vol. 48 1, Jan. 1971.

230. See e.g. Eisenberg L., The Ethics of Intervention: Acting Amidst Ambiguity, Journal of Child Psychology and Psychiatry 16:93-104, 1975.

231. See e.g. Culliton B.J., Mammograph Controversy: NIH's Entree Into Evaluating Technology, Science 198: 171-173, 1977.

232. See Wittenberg C.K., CIA Chief Reveals Behavioral Experiments, Psychiatric News, September 2, 1977, pp. 14, 15, 34.

233. Halleck S.L. Legal and Ethical Aspects of Behavior Control, American Journal of Psychiatry 131: 381-385, 1974.

the heading "Forced Treatment." The ethical concerns are most acute with regard to somatic and behavioral procedures the "effectiveness" of which is not dependent upon voluntary cooperation by the patient.

The need is for protective safeguards and means to assure that procedures do not "depersonalize" care. Such guidelines have been forthcoming—and should become a more prominent part of the training of mental health professionals.[234]

3. Screening by Status

Mental health knowledge has been proposed as relevant to predicting later performance, e.g., proposed mental health screening for politicians, judges, lawyers, safe drivers, in order to prevent later delinquency (pre-delinquency) and, more generally, for employees.[235]

But if "status" does not highly and accurately predict future performance, then ethical issues arise (i.e., invasion of privacy, stigma, unnecessary harm caused consequent to the status of mental disability, etc.). Some mentally ill or disabled persons are without doubt poor politicians, poor judges, poor doctors, poor lawyers, poor employees, unsafe drivers and even delinquents or criminals. But so are many other persons. In light of the problem of predicting human behavior and because of the costs of doing otherwise, it is reasonable to insist that "it is by their behavior you shall know them." In the absence of behavior, status is unreliable; in the presence of behavior status is often unneeded. Limiting prediction by status will, as much as any other approach, contribute to decreasing the stigma associated with mental disorder.

4. Forensic Testimony

Forensic testimony raises several problems. Expert testimony by mental health professionals may fail to distin-

234. See, e.g., Roos P., Human Rights and Behavior Modification, Mental Retardation, June 1974, pp. 3-6; Friedman, "Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons," 17 Ariz. L. Rev. 39 (1975).

235. See e.g. Hutschnecker A.A., A Suggestion: Psychiatry at High Levels of Government, the New York Times, Wednesday, July 4, 1973, p. C15, col. 2: Kuvin S.F., Saxe D.B., Psychiatric Examination for Judges, the New York Times, December 21, 1975, p. 13, col. 1: Refusal to Answer "Treatment for Mental Disorders" Question Not Fatal to New Jersey Bar Admission, 1MDLR 232, 1976; Shlensky R., Psychiatric Standards in Driver Licensing, Journal of the American Medical Association 235: 1993-1994, 1976; Few Cheers for "Bad Seed" Tests for the Young, the New York Times, April 19, 1970, Sec. 4, p. 13, col. 5; McDonald M.C., Civil Service Kills Controversial Question, Psychiatric News, December 3, 1975, pp. 1, 13.

guish fact from opinion.[236]

Mental health professionals should be discouraged from relating clinical findings to the final legal question, i.e., who is dangerous, insane, competent to stand trial.[237]

These judgments are, as a matter of policy and logic, social and legal and not professional. Conclusory testimony contributes to the legal decisionmaker (judge or jury) abdicating responsibility to reach legal conclusions. Considering the stakes involved—hospitalization versus prison, the rights of persons to manage their affairs, involuntary treatment and detention—the presentation of conclusory legal opinions by mental health professionals (made worse by inadequate description of the actual clinical findings) may constitute a misuse of mental health knowledge.

To raise questions concerning the role of mental health experts is not to deny tactical requirements of the adversary system.[238] The search for justice requires the use of experts. But it is worthwhile to indicate that legal decisionmakers may be unduly swayed when they have not been apprised of the limits and the logic of scientific knowledge of mental health professionals.

5. Privacy versus the Public's Right to be Informed

Mental health professionals may comment or write about the mental health, the behavior and the psychodynamics of persons whom they have never evaluated or even met. In an open society, such behavior, if it is wrong at all, may be only a "venial sin." But commentary from a distance, even if amusing, may disrupt both the privacy of the individual and the fairness of legal proceedings.[239]

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236. See e.g. Dix G.E., The Death Penalty, "Dangerousness," Psychiatric Testimony and Professional Ethics, American Journal of Criminal Law 5:151-214, 1977, (abuse of psychiatric testimony concerning the prediction of violence and the application of the death penalty); see, Greenland C., Psychiatry and the Dangerous Sexual Offender, Canadian Psychiatric Association Journal 22: 155-159, 1977 (problems of conclusory testimony and "double-agentry" in the handling of sex offenders.

237. See Shah S.A., Some Interactions of Law and Mental Health in the Handling of Social Deviance, Catholic University Law Review 23: 674-719, 1974.

238. Attention has also recently been drawn to the use of mental health knowledge in selecting and influencing juries. (See e.g. Goldstein T., The Science of Jury Selection, the New York Times, Feb. 16, 1975, p. 6, col. 4; Salisbury T.E., Forensic Sociology and Psychology: New Tools for the Criminal Defense Attorney, Tulsa Law Journal 12: 274-292, 1976). While there would be argument whether this use of mental health knowledge poses ethical problems, it has been pointed out that "the new techniques give an advantage to the wealthy." Such a formalized contribution to lawyerly instincts may also result in eventual distortion of the legal process.

239. See comments of Dr. James A. Brussel, Newsweek, Aug. 29, 1977, p. 28, about David Berkowitz (Son of Sam): "His motive is irrational . . . and that is enough to prove he is incompe-

6. The Turned-On Society

Mental health knowledge may be used not only to relieve problems, but for pleasure and to reduce everyday stress. The new Administrator of the Alcohol, Drug Abuse, and Mental Health Administration has discussed the increasing use of antianxiety drugs as follows:

> The Declaration of Independence promises us life, liberty and the pursuit of happiness. The American public has come to interpret this as including the absence of anxiety, guilt, and insomnia and looks to the health care system for the means to pursue happiness . . . . My prediction is that these trends will continue well into the future, not so much because the growth of new technology has raised expectations but because of an expansion of the definition of acceptable means for utilization of the health care system.[240]

To flag this area is to take no strong position concerning its ethical importance. Assuming, however, that the stresses of everyday life must be met by all and that in so doing we "grow," then using mental health knowledge to enhance the quality of life should be a subject for ethical debate.[241]

C. *Professionalism versus Consumerism*

1. Patients' Rights and Staff Rights

There is now a revolution of expectations of the mental health consumer, a revolution which may be generally subsumed under the name of "patients' rights."[242] Patients' rights and staff rights may, however, conflict. For example, do other patients or staff have a right to be free from intrusion by an especially aggressive patient? Such conflict may also result in poor patient/client care.[243] More thought is required concerning "rights and responsibilities" of both patients/clients and staff in mental health care.

2. Interprofessional Conflict

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tent." This type of public pronouncement from a mental health professional can raise many problems.

240. Klerman G.L., Mental Illness, the Medical Model, and Psychiatry, The Journal of Medicine and Philosophy 2: 220-243, 1977.

241. See also discussion in Brill N.Q., Preventive Psychiatry, Psychiatric Opinion 14(6): 30-34, 1977.

242. See e.g. Ennis B. and Siegel L., The Rights of Mental Patients, An American Civil Liberties Union Handbook, Avon Books, New York, 1973, and Friedman P., Rights of Mentally Retarded Persons, 1976.

243. See e.g. Gibson R.W., The Rights of Staff in the Treatment of the Mentally Ill, Hospital and Community Psychiatry 27: 855-859, 1976.

The needs of professionals (in competition with one another) may jeopardize the needs of the public. It is readily agreed that "[t]here should no longer be divisive wedges among professions striving toward the common goal of providing a high quality, comprehensive, and coordinated system of health care equally accessible to all."[244] Achieving such interprofessional cooperation is, however, often difficult. Increasing divisiveness among professional mental health groups is to be anticipated as groups struggle for inclusion of their services in any national mental health insurance plan.

There are, however, approaches which may promote interprofessional cooperation rather than divisiveness. Periodic interdisciplinary meetings of the mental health professions might jointly review present practices, codes of conduct, position statements and the increasing responsibilities of all the professions to the consumer. "Competency-based" approaches should be explored as one means of dividing tasks between mental health professionals and assuring that each group is reimbursed for its services.[245]

Formulation of interprofessional codes delineating the responsibilities and the prerogatives of professions, one to another, may serve to unite them.

3. Ethical Codes

Ethical codes may restrict a dissemination of knowledge about professionals, their competencies and their availability and other information needed by the consumer.[246] Over the long run, some autonomy of the health professions in setting standards of conduct, regulating norms of practice and determining qualifications is in the public interest. But while professionalism protects the public, it also poses difficult issues concerning the sharing of knowledge and power.[247] The professional-patient relationship is now in flux. Attention needs to be directed to

244. Position Statement on Psychiatrists' Relationship with Nonmedical Mental Health Professionals. American Journal of Psychiatry 130: 386-390, 1973.

245. See e.g. Nelson S.H., Current Issues in National Insurance for Mental Health Services, American Journal of Psychiatry 133: 761-764, 1976.

246. See e.g. discussion in F.D.A. Begins 'Trial' of M.D. Societies, Medical World News, Sept. 19, 1977, pp. 21-22; see discussion of *Bates v. State Bar of Arizona*, 45 U.S. Law Week 4895, 1977, in Supreme Court Holds Lawyers May Advertise, American Bar Association Journal 63: 1092-1098, 1977.

247. See generally Freidson E., Professional Dominance: The Social Structure of Medical Care, Atherton Press, New York, 1970.

both problems and benefits which may flow from "contractual ethics" in the professional-patient relationship and in the obtaining of mental health services.[248]

There are ways, we believe, in which a strengthening of the Codes of Ethics in the various mental health disciplines might contribute to resolution of a variety of ethical problems. Such codes serve at least three related functions.

While it is difficult to separate the effect of a formal code of ethics from other sources of ethical conformity, such as the professional's personal moral commitments, the codes perform an important *socialization function* in the training of neophyte mental health professionals. They serve to inculcate normative standards against which to measure alternative responses to future ethical dilemmas. By virtue of their authoritative, "official" endorsements, ethical codes may provide influential symbolic models for the performance of ethical behavior.

Secondly, ethical codes serve an increasingly large *screening function* in admitting mental health professionals into practice. In California, for example, psychologists must virtually recite the American Psychological Association Code of Ethics by heart during the licensing examination. Knowing ethical standards, of course, does not necessarily imply abiding by them, but a lack of such knowledge may attenuate ethical conformity. In this sense, the increased stress placed on ethical codes in professional initiation rites may help to promote ethical behavior.

Finally, ethical codes serve an important *monitoring function*. Through the threat of sanction for their violation—either losing membership in the professional organization or State licensure—the codes act as a deterrent against unethical professional conduct.

How might these three functions of professional codes of ethics be strengthened? First, a course in professional ethics should be required as part of the graduate curriculum in each of the mental health disciplines. While there has been a substantial increase in the literature on the ethics of psychological intervention, this literature has yet to become part of the "mainstream" of graduate education in

248. See e.g. Masters, R.D., Is Contract an Adequate Basis for Medical Ethics? An Examination of the Concept for Health Care. The Hastings Center Report 5(6): 24-28, 1975.

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the mental health disciplines. It is treated as something the practitioner or researcher will "pick up" as s/he encounters ethical dilemmas. Moral crises, however, are better prepared for than reacted to. In the wake of the poverty of moral reasoning ability demonstrated by many attorneys in the Watergate scandal, the American Bar Association in 1974 voted that every ABA-approved law school:

> shall provide and require for all student candidates for a professional degree, instructions in the duties and responsibilities of the legal profession. Such acquired instruction need not be limited to any pedagogical method as long as the history, goals, structures and responsibilities of the legal profession and its members, *including the ABA Code of Professional Responsibility*, are all covered.[249]

Rather than waiting for a moral Watergate to occur in the mental health field, graduate education in applied ethics, emphasizing the implementation of professional codes of ethics, should be a required part of the curriculum in each of the mental health disciplines.

Secondly, state licensure examinations in the mental health disciplines should stress knowledge of professional codes of ethics and their implementation in specific problematic situations. While some states are emphasizing knowledge of codes of ethics in their licensing examinations in psychiatry, psychology and social work, there is much variability by state and by disciplines. The Commission might lend its prestige to reinforcing this trend toward a greater emphasis on ethical issues in screening procedures.

Finally, professional organizations should strengthen their capacity to investigate and act upon complaints of violations of their codes of ethics. Advisory opinions should be offered to professionals requesting an interpretation of the code in specific fact situations. All professions are notorious for their lack of self-regulation and the tendency to protect their own no matter how incompetent. The mental health disciplines are no exception. It is essential that professional organizations be goaded into

249. American Bar Association Standards and rules of Procedure, Section 302(a)(iii).

taking more seriously their obligation to monitor the ethical behavior of their members.

D. *Health Care As A Right*

1. The Right To Treatment

"Ethical problems" arise when rights are compromised in the name of treatment or care, yet no treatment or care is forthcoming or even potentially available. The *quid pro quo* requires (at a minimum) adequate staff, a decent treatment environment and the availability of programs, and an individualized approach to care.[250]

2. The Availability and Distribution of Resources

The problem of health-care delivery is closely tied to plans for national health insurance. Many arguments have been advanced, yet it seems fair to say that a genuine "right to health care" has not yet been recognized.[251] A future goal under any national health plan would be to preserve some "freedom of choice" for the consumer while assuring a more efficient and more adequate volume of available services.[252]

But ethical questions also arise concerning the distribution of present resources, geographically (urban-rural) and as a function of age (children versus the aged), but also as a consequence of wasteful and jerry-built systems of care.

Even "catchmenting" and other strategies for service provision may compromise the care of some difficult patients. The patient may not be able to choose where care is to be received. There is a mismatch between the patient and the ability or willingness of a sole provider to meet these needs.

Attitudes toward mentally handicapped persons may also restrict the provision of services, particularly in the area of reproduction and sexual freedom. Mentally handicapped individuals should have access to family planning and birth control services, including sterilization, on the

250. See Position Statement on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded, the American Journal of Psychiatry 134: 354-355, 1977; see generally Hoffman P.B., Dunn R.C., Beyond *Rouse* and *Wyatt*: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment, Virginia Law Review 61: 297-339, 1975.

251. See generally Blackstone W.T., On Health Care as a Legal Right: An Exploration of Legal and Moral Grounds, Georgia Law Review 10: 391-418, 1976.

252. See As the Nation Moves Toward National Health Insurance, What About the Mentally Ill? American Psychiatric Association, 1977.

same basis as any other person, but no such handicapped individual should be sexually sterilized except upon his or her own volition.

Years after the infamous *Relf*[253] case in Alabama, there continue to be frequent instances of attempts by parents, guardians and officials of mental institutions to secure the sexual sterilization of mentally handicapped (particularly mentally retarded) persons in their custody or control. The Task Panel believes that sterilization, like other family and birth control services, should not be denied to those handicapped persons who are of age, are capable of understanding the nature and consequences of the procedure and can manifest at least a genuine desire to be sterilized.

However, although the courts have reached mixed conclusions, the Panel believes that the better view of the law[254] and ethical considerations forbid sterilization of a mentally handicapped individual—*i.e.*, the irreversible denial of such individual's fundamental right to procreate—except upon the consent of the person to be sterilized, if s/he is capable of giving such consent. This means that parents, guardians and others may not give substituted consent to sterilization of their handicapped children or charges and that a handicapped person who is incapable of consenting may not be sterilized at all. This policy can be implemented at the Federal level by appropriate regulations governing Medicaid and other public health programs and at the State level by appropriate legislation.

Cost-control mechanisms will become increasingly important. Through standard-setting, the quality of care is enhanced. But subtly and not so subtly, cost-control mechanisms (PSRO - Utilization Review) may also jeopardize care.

The practitioner who properly orients himself to the needs of the individual patient/client is nevertheless confronted with societal needs to conserve resources and to promote efficiency of care.[255] The choice must sometimes

253. *NWRO and Relf v. Weinberger*, 372 *F. Supp.* 1196 (D.D.C. 1974), 403 *F. Supp.* 1235 (D.D.C. 1975), *vacated as moot*, No. 74-1787/76-1053, (D.C. Cir., September 13, 1977).

254. See *Wyatt v. Aderholt*, 368 *F. Supp.* 1383 (M.D. Ala. 1974).

255. See generally Burnum J.F., The Physician as a Double Agent, The New England Journal of Medicine 297: 278-279, 1977; Fried C., Rights and Health Care—Beyond Equity and Efficiency, The New England Journal of Medicine 293: 241-245, 1975.

be made whether to discharge or retain a patient who has no proper place to go, but who nevertheless no longer qualifies for third-party reimbursement. The choice of "treatment" may be dictated by the availability of third-party reimbursement (inpatient versus outpatient care). There are also problems of recordkeeping. Medical records dovetail with administrative requirements. Records may document a need for active care (but distort the severity of the patient's condition) so that retention in a facility is permitted. At a future time this may work against the patient's interest.

The multiple problems now arising in the area of cost control may be only suggested. Monitoring of cost-control mechanisms is necessary so that these not jeopardize patient/client care.[256]

Research at the expense of services also raises ethical questions. But a legitimate research enterprise (which *is* in the best interests of the public and patient/clients) requires a critical mass of trained personnel and available funds.[257]

3. Treatment (Medical or Social) for the Severely Disabled

Respect for life includes respect for life of the severely disabled. The value of persons is not a function of their productivity. By respecting the differences and the needs of severely disabled persons, society inculcates the values of altruism, empathy and generosity. The mentally disabled have treatment rights not only because they are persons with feelings but because, like all other persons, their life is valuable to society. This perspective deserves consideration when, for example, it is debated whether to prolong the life of a severely retarded person.[258]

It has been reported that doctors at prominent university hospitals routinely have allowed newborn children to die, with at least the tacit consent of the parent, when such children are born with obvious mental or physical handi-

256. See e.g. Price, S.J., Katz, J., Provence, M., An Advocate's Guide to Utilization Review, Clearinghouse Review 11(4): 307-331, 1977.

257. See Brown B.S., The Crisis in Mental Health Research, American Journal of Psychiatry 134: 113-120, 1977.

258. See problems raised by *Jones v. Saikewicz* No. SJC-711 (Mass. Sup. Jud. Ct., July 9, 1976), No. SJC 76-116 (Mass. Sup. Jud. Ct., Nov. 30, 1977), in Corbett, K.A., Raciti, R.M., Withholding Life-Prolonging Medical Treatment for the Institutionalized Person-Who Decides? New England Journal on Prison Law 3: 47-82, 1976 (question whether to administer painful treatment for leukemia to a profoundly retarded 67 year old man; "the incompetent patient's right to life deserves at least the same protection that the law affords competent people").

caps. Not infrequently, instances come to light where parents or guardians explicitly refuse life-sustaining medical care to such infants or to their older children or wards. Such denial of needed medical measures is not generally based upon religious tenets, but rather on the assumption that the life of a handicapped person, such as one who is severely or profoundly mentally retarded, is somehow less valuable than that of a "normal" individual. This rather shocking notion is gaining increasing respectability in some quarters.

Some Guidelines for Problem Resolution

The above discussion illustrates some ethical problems in the area of mental health care. The options and choices have not been discussed in any detail. Identification of problems does point to some general guidelines for resolution. The aim is to respect—to the greatest degree possible—both the needs and the autonomy of all persons in society.

1. Clarify Roles and Allegiances
   While in exceptional circumstances the needs of society cannot be overlooked, therapists owe primary allegiance to their patient/clients. Given conflict and the likelihood of "mixed allegiances," the therapist may attempt to establish a treatment contract not with the individual but with the larger social unit including the individual, e.g., the family. With foreknowledge, the therapist works for the best interests of the family, not for individuals.

2. Identify Level of Decisionmaking
   Again, therapists owe primary allegiance to their patients/clients. They cannot, for example, be expected to do a "social cost-benefit analysis" concerning a patient/client's treatment. There are different levels of obligation—one for therapists, another for administrators.[259] The task of allocating resources is best done from "above," i.e., by administrators and planners.

3. Responsiblities to Inform
   The allegiances and roles of the mental health professional and his/her level of decisionmaking should be shared with patients/clients prior to intervention or evaluation. This is partly a requirement for "informed con-

259. Fried 1975; see also Burnum 1975, Hiatt 1975.

sent" prior to intervention or evaluation, partly a requirement for patient-education, partly a matter of achieving social consensus regarding proper mental health roles.

4. Respect the Patients'/Clients' Right to Decide
The technical expertise of the professionals and their professional recommendation should be shared with patients/clients. But patient decisionmaking, while incorporating professional expertise, is not synonymous with professional decisionmaking. The final decision—whether or not to accept treatment, and what type of treatment is desired—is a decision which, save in exceptional circumstances, belongs to the patient.[260]

260. See e.g. Imbus S.H., Zawacki B.E., Autonomy for Burned Patients When Survival is Unprecedented, The New England Journal of Medicine 297: 308-311, 1977; see Slack W.V., The Patient's Right to Decide, The Lancet, Vol. 2, July 30, 1977, p. 240.

Appendix A: List of Recommendations

The recommendations of the Task Panel on Legal and Ethical Issues are set forth below. The reader should be aware, however, that certain important areas such as ethical issues, discussed in Section V of our report, do not culminate in recommendations.

Advocacy

Recommendation 1.

The President's Commission should support legislation which would establish and adequately finance a system of comprehensive advocacy services for mentally handicapped persons.

Recommendation 2.

The protection and advocacy (P&A) systems established in each State under the Developmentally Disabled Assistance and Bill of Rights Act as of October 1977 should be carefully evaluated and this approach to advocacy services should be supported if it proves effective. If it does, mentally ill persons should either be brought within the jurisdiction of the "P&A" systems or else a parallel system which will represent mentally ill persons should be established.

Recommendation 3.

The President's Commission should support efforts by which currently existing legal aid, legal services and public defender programs and the private bar at large can more adequately represent mentally handicapped persons at every stage at which such persons have contact with the mental disability system. These efforts should be directed at providing a continuity of legal care and should include, but not be limited to, the following:

(a) Recommending to the Legal Services Corporation that it establish a national support center to assist local offices in representation of mentally handicapped persons, and that it run special training programs so that members of local offices can effectively and adequately represent mentally handicapped persons.

(b) Endorsing legislation which would give the United States Department of Justice standing to litigate on behalf of mentally handicapped persons whose civil and/or constitutional rights have been violated.

(c) Endorsing legislation which would mandate the Law Enforcement Assistance Administration of the Department of Justice to provide economic, staff and training support to State and local public defender and prisoners' rights programs so as to provide more effective and adequate representation for mentally handicapped persons who have been criminally charged and/or who are incarcerated in jail or prison facilities.

Education

Recommendation 4.

The Department of Health, Education, and Welfare should vigorously implement and enforce the requirements of the Education of All Handicapped Children Act, Public Law 94-142, (20 U.S.C. §1401 *et. seq.*) and the new regulations implementing section 504 of the Rehabilitation Act (45 C.F.R. Part 84). A program of financial assistance, similar to the Emergency School Aid Act, should be initiated to help school districts with the costs of compliance. The funds for such a program could be drawn from other education programs that have outlived their usefulness such as Emergency School Aid and the Impact Aid program.

Recommendation 5.

As part of their right to education, mentally handicapped individuals should be provided with compensatory education services beyond ordinary age limits, where past deprivation of education makes this necessary.

Recommendation 6.

Institutionalized mentally disabled children must also be provided with an appropriate education, in a community setting wherever possible, as the Education for All Handicapped Children Act of 1975 requires. Surrogate parents, not drawn from institutional staff, must be appointed to protect the rights of such children when the natural parents are unavailable.

Recommendation 7.

Colleges and universities must be encouraged and assisted to train teachers and other education personnel in methodologies appropriate for instruction of severely handicapped individuals and for management of handicapped students in a regular classroom setting.

Recommendation 8.

States must be encouraged, assisted and required, if necessary, to provide training for parents, guardians, surrogate parents and lay advocates in the use of special education due process procedures, as well as for the hearing officers designated to conduct due process hearings. HEW should collect and analyze the transcripts and records of a representative sample of such hearings and take appropriate action to ensure that educational placement decisions are made after full and fair consideration of all relevant factors, including the views of those representing the interests of the student.

Employment

Recommendation 9.

The Task Panel endorses the efforts of the Department of Labor to enforce section 503 of the Rehabilitation Act and encourages volun-

tary compliance with both 503 and 504 by private employers who are not regulated by these sections.

Recommendation 10.

Title VII of the Civil Rights Act of 1964 should be amended to prohibit discrimination on the basis of handicap.

Recommendation 11.

State minimum wage and civil rights laws should be amended to prohibit discrimination against the handicapped.

Recommendation 12.

Congress should be requested to condition revenue sharing upon an agreement by State governments that mentally handicapped persons who, as employees, perform work of consequential economic benefit to the States shall be paid either the minimum wage or else wages which are commensurate with those paid nonhandicapped workers in the same vicinity for essentially the same type, quality and quantity of work, whichever is higher. States should be required, as a condition of revenue sharing, to agree to the same principles as are currently embodied in 29 CFR Part 529.

In the alternative, the provisions of 29 CFR Part 529 should be incorporated in their entirety into HEW regulations 45 CFR Part 84, subpart B (employment practices) implementing section 504 of the Rehabilitation Act of 1973.

Housing Within The Community

Recommendation 13.

(a) State zoning laws should be enacted which preempt local zoning ordinances and permit small group homes for the mentally handicapped to be considered as permitted "single family residential uses of property."

(b) States revising their zoning laws to avoid discrimination against mentally handicapped persons should be alert to the problems of restrictive building codes and/or mutual private restrictive covenants which would undermine the goal of reform.

(c) State zoning laws should also prohibit the excessive concentration of group homes in any single neighborhood or municipality within a State.

Recommendation 14.

(a) Title VIII, Fair Housing, of the Civil Rights Act of 1968 should be amended to prohibit discrimination in housing on the basis of mental handicap.

(b) The Department of Housing and Urban Development should (1) encourage States and localities to allocate additional community block grant funds to develop more group care facilities and (2) make additional rental assistance funds available to mentally disabled persons living in group homes.

Guardianship

Recommendation 15.

(a) State guardianship laws should be revised to provide:

(1) increased procedural protections including, but not limited to, written and oral notice, the right to be present at proceedings, appointment of counsel, a clear and convincing evidence standard as the burden of proof, a comprehensive evaluation of functional abilities conducted by trained personnel, and a judicial hearing which employs those procedural standards used in civil actions in the courts of general jurisdiction of any given State;

(2) a definition of "incompetency" which is understandable, specific, and relates to functional abilities of people;

(3) the exercise of guardians' powers within the constraints of the right to the least restrictive setting, with no change made in a person's physical environment without a very specific showing of need to remove a person to a more restrictive setting; and

(4) a system of limited guardianships in which rights are removed and supervision provided only for those activities in which the person has demonstrated an incapacity to act independently.

(b) Public guardianship statutes should be reviewed for their effect in providing services to persons in need of but without guardianship services.

Confidentiality

Recommendation 16.

Federal and State laws should recognize the principle that patients must have access to their mental health records and the opportunity to correct errors therein.

Recommendation 17.

Except where otherwise required by law, confidentiality of mental health information must be strictly maintained by all persons who have contact with such information. Mental health professionals must alert their patients at the outset of therapy about special conditions under which complete confidentiality cannot be maintained. States should also enact strong penalties for the inappropriate release of confidential materials by mental health professionals without the patients' consent.

Recommendation 18.

Consent forms for release of information concerning patients' histories should be limited to particular items of information in their records relevant to the specific inquiry posed by third parties who have a legitimate need for such information. Blanket release forms

should be prohibited, and nonspecific requests for information should not receive response. Consent to release information should be of limited duration and should be revocable by the patient at any time. A record should be maintained in each patient's file describing what information has been released, when, to whom and for what purposes.

Recommendation 19.

Employers' questions to job applicants and employees must be related to objective functioning skills directly relevant to the specific job for which the applicant or employee is being considered.

Recommendation 20.

Third-party insurers should be encouraged to utilize peer review or other similar mechanisms which allow an evaluation of the necessity and appropriateness of treatment to be conducted while the patient's identity remains anonymous. Centralization and sharing of personal information without the express, written consent of the patient or client should be prohibited.

Recommendation 21.

The Task Panel has reviewed and generally supports the report of the Privacy Protection Study Commission, *Personal Privacy in an Information Society*, concerning confidentiality of medical records. Implementation of that Commission's recommendations should be required not just in Medicare/Medicaid institutions as the report suggests but by all facilities maintaining mental health records.

Federal Benefits

Recommendation 22.

Existing Federal statutes, regulations and programs should be reviewed for instances of discrimination aqainst mentally handicapped individuals. Appropriate legislative or administrative action should be taken to eliminate barriers and other restrictive provisions or practices.

Recommendation 23.

(a) Federal assistance programs should be administered and governing legal provisions modified, where necessary, to implement the principle of placement or treatment in the "least restrictive alternative" and to foster deinstitutionalization of mentally handicapped individuals. Appropriate measures might include the following steps:

(1) A class of intermediate care facilities for mentally ill persons, comparable to those for mentally retarded individuals and others but limited to a maximum of 15 beds, should be created under the Medicaid program.

(2) "Clinic services" should be a required rather than an optional service in Medicaid; the limitations on outpatient physician services in Medicare should be eliminated; and both Medicare and Medicaid

benefits should be made available for inpatient and outpatient services in community mental health centers for the mentally handicapped of all ages.

(3) The thrust of the current Medicaid intermediate care program for mentally retarded persons should be directed toward community-based, rather than institutional, facilities for mentally retarded persons, and appropriate changes should be made in the ICF/MR regulations where necessary to facilitate use of Medicaid funds for community-based programs. Medicaid should also be amended to require home health services for children under 21.

(4) The Department of Health, Education, and Welfare should strictly enforce the Medicaid standards for residential institutions for mentally retarded persons set forth in 45 CFR §§249.12 and 241.13 and should ensure prompt decertification of those large institutions which do not meet the standards.

(5) Preadmission or admission certification, peer review and utilization review and relevant PSRO activities requirements should be enforced in all inpatient facilities under Medicare and Medicaid to ensure that hospital, skilled nursing (SNF) or intermediate (ICF) care is provided only on the basis of individual need and that alternative, less restrictive placements are considered and provided when appropriate.

(6) HEW should require State plans submitted pursuant to Title XX of the Social Security Act (42 U.S.C. 1397 *et. seq.*) to address specifically the problems and needs of mentally handicapped persons who live in the community or who could live in the community if financial or other assistance were available.

(7) HEW should require State Developmental Disabilities Councils and other agencies funded under the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6001 *et seq.*) to focus their activities on deinstitutionalization of developmentally disabled individuals and on creation of community-based living arrangements' day programming and support services for such individuals. HEW should specifically prohibit use of D.D. Act funds for construction, renovation or expansion of large institutional facilities.

(8) HEW should develop regulations which require State mental health plans mandated under Pub. L. 94-63 (42 U.S.C. 2689t) and State health plans required under Pub. L. 93-641 (42 U.S.C. 300m-2(a)(2); 42 U.S.C. 300k-1 *et seq.*) to evaluate resources for community programs for the mentally handicapped and to plan for the development of community resources that will ensure that mentally handicapped persons are enabled to live in the least restrictive setting consistent with their individual needs.

(9) Federal guidelines for State regulation of group homes (board and care homes) where SSI recipients are living should emphasize the need to encourage personal independence and to provide access

to necessary health care and social services. The Department of Health, Education, and Welfare should ensure rapid compliance with the interim regulations requiring counselling, and social and other services for children under 7 as well as for those children unable to attend school.

(10) Federal AFDC foster care funds for children should be available only if out-of-home placement is in the least restrictive setting and in as close proximity to the child's home as is consistent with the child's special needs.

(11) The Department of Health, Education, and Welfare should, within the Office of the Secretary, examine the impact of Supplemental Security Income, Medicaid, and other Federal programs on the deinstitutionalization of mentally handicapped children, and develop specific proposals for reducing inconsistent fiscal incentives and regulations.

(b) As a direct, initial, positive step, the Federal government should develop within 180 days of the Commission's report a coordinated response to and plan for implementation of the recommendations contained in the GAO report of January 7, 1977, "Returning the Mentally Disabled to the Community—Government Needs to Do More."

Recommendation 24.

Necessary steps should be taken to adapt and, where necessary, expand "generic" Federal programs so that they meet the needs of mentally handicapped individuals. Provisions in the laws creating such programs which are designed to assist the mentally handicapped should be fully and promptly implemented.

Recommendation 25.

Federal program and funding agencies should promptly promulgate and enforce regulations implementing section 504 of the Rehabilitation Act of 1973, which specifically prohibits discrimination against handicapped persons by any recipient of Federal funds.

Recommendation 26.

There should be periodic program reviews of the utilization of federally funded benefits and services by the mentally handicapped in order to assess the quality and quantity of services provided and to determine their effectiveness in meeting the needs of the mentally handicapped and in promoting independent living.

The Right To Treatment And To Protection From Harm, The Right To Treatment In The Least Restrictive Setting and The Right To Refuse Treatment And The Regulation of Treatment

Recommendation 27.

The President's Commission in its final report should endorse the underlying legal and ethical bases for the right to treatment and pro-

tection from harm, the right to treatment in the least restrictive setting and the right to refuse treatment and the regulation of treatment. The Federal and State governments should be encouraged to protect these rights by legislation and other appropriate action.

Experimentation With Mentally Handicapped Subjects

Recommendation 28.

An educational campaign must be directed to the general public with regard to individual opportunity and obligation to participate in the advancement of scientific knowledge. A disproportionate share of the risk for the benefit of society as a whole should not be assigned to "convenient"—often institutionalized—populations, including mentally handicapped individuals. Rather, to the extent possible, such persons should bear *less* risk than those who are more able to make free and uncoerced decisions.

Recommendation 29.

(a) Covert experimentation involving risks ought never to be permitted, regardless of the asserted justification, and full disclosure of such matters as research risks, expected benefits and the right to refuse participation must be made to potential subjects and, where appropriate, to their parents, surrogate parents or legal guardians.

(b) Experimentation which is neither directly beneficial to individual subjects nor related to such subjects' mental condition and which poses any degree of risk to such subjects should not be permitted with institutionalized mentally handicapped individuals.

(c) Research performed for the direct benefit of a mentally handicapped subject after nonexperimental procedures, if any, have been exhausted should be permitted where the risk/benefit ratio is favorable and there are adequate procedures for obtaining the subject's consent or, where appropriate, the consent of the subject's parent, parent surrogate or legal guardian. High-risk experimental procedures such as psychosurgery should be permitted, if at all, only upon the informed consent of the subject himself; some such procedures ought to be prohibited altogether, at least with respect to institutionalized individuals.

Recommendation 30.

At a minimum, research upon mentally handicapped individuals for the purpose of obtaining new scientific or medical information should be conditioned upon the following requirements:

(a) The research protocol must undergo independent review for scientific merit of the research design and for competence of the investigator.

(b) The institution, if any, in which the research is to be conducted must meet recognized standards for medical-care, direct-care and other services necessary to meet the increased demands imposed by

research activities, in addition to the ordinary requirements of adequate care and treatment.

(c) The proposed research must not reduce the level of habilitative or rehabilitative services available either to research participants or to patients or clients not included in the project.

(d) The experimentation must involve an acceptably low level of risk to the health or well-being of the research subjects.

(e) The proposed research should relate directly to the prevention, diagnosis or treatment of mental disability and should seek only information which cannot be obtained from other types of subjects. Such information should be of high potential significance for the advancement of acknowledged medical or scientific objectives related to mental disability.

(f) Research involving risk may be performed only on patients or clients who are actually competent to consent to participation therein and who have in fact given such consent. Substituted consent to procedures involving risk should not be permitted except in the most unusual and compelling circumstances and never in the face of objections, however expressed, by the patient or client himself. All consent should be subject to review and approval by an independent body, with an opportunity for patients or clients to be advised and represented in this process by an independent advocate (who may be an attorney).

(g) All subjects, and where appropriate their parents or guardians, should be provided with and informed of their right to any follow-up care necessitated by unforeseen harmful consequences of the research project.

Recommendation 31.

(a) Whatever schema is eventually put forward by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research should be considered as tentative and subject to continuous review.

(b) A permanent National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, with a membership including mentally handicapped individuals and/or former patients or institutional residents and parents of children with mental handicaps should be established to evaluate and, if necessary, modify the policies resulting from the recommendations of the current Commission and to monitor the performance of institutional review boards and other bodies charged with protection of the rights of research subjects.

Civil Commitment

Recommendation 32.

The civil commitment system as it exists in most States today should be drastically reformed. Responsible arguments can be made for

modified abolition of civil commitment, for authorizing commitment only of "dangerous" persons or for time-limited involuntary commitment of persons who are mentally handicapped and also incompetent to make treatment decisions.

Recommendation 33.

(a) Whatever substantive commitment standard is adopted, even-handed adminstration should be promoted by the use of specific definitions and criteria.

(b) The Department of Health, Education, and Welfare should fund studies to ascertain the differential effects of commitment criteria in jurisdictions which have adopted different models of involuntary civil commitment.

Recommendation 34.

Voluntary mental health and protective services should be made easily available to those who seek them.

Recommendation 35.

(a) Commitment procedures should be adopted to ensure fair resolution of the issues at stake.

(b) Procedural protections should include, but not necessarily be limited to, initial screening of potential commitment cases by mental health agencies, a prompt commitment hearing preceded by adequate notice to interested parties, the right to retained or assigned counsel, the right to a retained or assigned independent mental health evaluator, a transcript of the proceedings, application of the principle of the least restrictive alternative, a relatively stringent standard of proof (at least "clear and convincing" evidence), durational limits on confinement (with the ability of a court to specify a period of confinement short of the statutory maximum) and the right to an expedited appeal. At the commitment hearing, the rules of evidence shall apply and the respondent should have the right to wear his own clothing, to present evidence and to subpoena and cross-examine witnesses. Ideally, the petitioner should also be represented by counsel.

Mental Health Issues Affecting Persons Accused or Convicted Of Crimes

Recommendation 36.

Mental Health Services to Prisoners

(a) Mentally handicapped persons incarcerated in jails and prisons should have reasonable access to quality mental health services which are delivered on a truly voluntary basis with confidentiality comparable to that which exists in private care. This can occur only if participation in treatment is unrelated to release considerations. Medicaid reimbursement should be extended to include voluntary jail and prison mental health care.

(b) In order for mental health services to be truly voluntary and optimally effective, prisons must first establish minimally adequate

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physical and psychological environments. The Department of Justice should place a high priority on allocating Federal grant funds to the improvement of prison living conditions.

(c) Prisoners from racial or ethnic minority groups should have access to mental health professionals from similar backgrounds.

(d) If a mentally handicapped prisoner is transferred involuntarily from a prison to a mental hospital, the involuntary transfer should be preceded by procedural protections equivalent to those available in ordinary civil commitment. Indeed, such "commitment-like" procedures should be followed even before a prisoner receives involuntary mental health treatment within a correctional institution itself.

(e) In cases where a mentally handicapped prisoner desires mental health treatment and where mental health and correctional authorities concur that a hospital setting would be appropriate and beneficial to the prisoner, procedures should be developed for effectuating a voluntary hospital admission. The prisoner's good-time and parole opportunities ought not to be jeopardized by the transfer—in fact, good-time and parole opportunites should not be jeopardized even for involuntarily committed prisoners.

(f)(1) Mental health professionals, as a general rule, should decline to provide predictions of future criminal behavior for use in sentencing or parole decisions regarding individual offenders.

(2) If a mental health professional decides that it is appropriate in a given case to provide a prediction of future criminal behavior, s/he should clearly specify:

(a) The acts being predicted;

(b) The estimated probability that these acts will occur in a given time period; and

(c) The factors on which the predictive judgment is based.

Recommendation 37.

(a) Evaluations to determine whether a defendant is competent to stand trial should be performed promptly and should, if possible, be performed in the defendant's home community and on an outpatient basis. Outpatient dispositions should be considered in certain instances even for defendants found, after evaluation and hearing, to be incompetent to stand trial.

(b) A defendant who, because of psychotropic medication, is able to understand the nature of the proceedings and to assist in his defense, should not automatically be deemed incompetent to stand trial simply because his satisfactory mental functioning is dependent upon the medication, and should have the option of going forward with his trial.

(c) Recent proposals by legal commentators to abolish the incompetency plea (and to substitute for it a trial continuance and then a trial with enhanced defense protections) are deserving of further study.

(d) At a minimum, the limitations imposed by *Jackson v. Indiana* upon the nature and duration of incompetency commitments ought to be acknowledged and enforced nationwide.

Recommendation 38.

(a) Laws authorizing the involuntary committment of sexual psychopaths and other "special" offenders (such as "defective delinquents") should be repealed.

(b) Persons who are now being committed as sexual psychopaths or "special" offenders should instead be:

(1) Processed through and treated in the criminal justice-correctional system, or

(2) Given the option whether to be treated within (i) the correctional system or (ii) a therapeutic system in which the period of confinement could not exceed the applicable criminal law maximum sentence.

Bills of Rights

Recommendation 39.

The President's Commission should recommend to the legislatures of the individual States that legislation be enacted providing a "Bill of Rights" for all mentally handicapped persons, both those who are institutionalized and those residing in the community.

Recommendation 40.

The President's Commission should recommend to the States that all currently existing laws establishing rights of patients, of persons in treatment and of residents of hospitals, facilities for the retarded or similar institutions should be prominently displayed in all living areas, wards, hallways and other common areas of all such facilities, and should be incorporated into all staff-training and staff-orientation programs as well as in educational programs directed to patients, staff, families and the general public. Explanation of rights to patients should be clearly and simply stated and in a language the patient understands; the explanation should be read to any patient who cannot read.

National Initiatives in Legal and Ethical Issues

Recommendation 41.

NIMH and other appropriate HEW components should establish special offices concerned with legal issues affecting the mentally ill and the developmentally disabled, respectively. These offices should be charged with (1) keeping the staff of NIMH and HEW informed about legal and ethical issues affecting mentally handi-

capped persons, (2) providing continuing advice from that perspective on program and policy issues, (3) promoting advocacy on behalf of the mentally handicapped, (4) promoting attention to legal issues in Federal programs for the mentally handicapped, and (5) promoting interdisciplinary exchange.

Recommendation 42.

NIMH and other appropriate HEW components should fund innovative programs at law schools and mental health professional schools or other appropriate institutions which are designed to develop persons with policy, administrative and direct-service responsibilities in both the mental health and the legal system who will be knowledgeable about the delivery of services and the legal and ethical issues involved with patient care. Financial support should also be given for innovative in-service training programs at service facilities which are designed to provide continuing education for service providers concerning legal and ethical rights and for training projects for lawyers, judges, and non-lawyer advocates. These agencies should also support research into legal and ethical issues and problems, such as those highlighted in this report.

Appendix B: Research and Training Initiatives

Listed below, for the reader's convenience, are all the research and training recommendations found throughout this report:

Advocacy

Recommendation 2.

The protection and advocacy (P&A) systems established in each State under the Developmentally Disabled Assistance and Bill of Rights Act as of October 1977 should be carefully evaluated and this approach to advocacy services should be supported if it proves effective. If it does, mentally ill persons should either be brought within the jurisdiction of the "P&A" systems or else a parallel system which will represent mentally ill persons should be established.

Recommendation 3.

The President's Commission should support efforts by which currently existing legal aid, legal services and public defender programs and the private bar at large can more adequately represent mentally handicapped persons at every stage at which such persons have contact with the mental disability system. These efforts should be directed at providing a continuity of legal care and should include, but not be limited to, the following:

(a) Recommending to the Legal Services Corporation that it establish a national support center to assist local offices in representation of mentally handicapped persons, and that it run special training programs so that members of local offices can effectively and adequately represent mentally handicapped persons.

(c) Endorsing legislation which would mandate the Law Enforcement Assistance Administration of the Department of Justice to provide economic, staff and training support to State and local public defender and prisoners' rights programs so as to provide more effective and adequate representation for mentally handicapped persons who have been criminally charged and/or who are incarcerated in jail or prison facilities.

Education

Recommendation 7.

Colleges and universities must be encouraged and assisted to train teachers and other education personnel in methodologies appropriate for instruction of severely handicapped individuals and for management of handicapped students in a regular classroom setting.

Recommendation 8.

States must be encouraged, assisted and required, if necessary, to provide training for parents, guardians, surrogate parents and lay advocates in the use of special education due process procedures, as well as for the hearing officers designated to conduct due process

hearings. HEW should collect and analyze the transcripts and records of a representative sample of such hearings and take appropriate action to ensure that educational placement decisions are made after full and fair consideration of all relevant factors, including the views of those representing the interests of the student.

Guardianship

Recommendation 15.

(b) Public guardianship statutes should be reviewed for their effect in providing services to persons in need of but without guardianship services.

Civil Commitment

Recommendation 33.

(b) The Department of Health, Education, and Welfare should fund studies to ascertain the differential effects of commitment criteria in jurisdictions which have adopted different models of involuntary civil commitment.

Mental Health Issues Affecting Persons Accused Or Convicted Of Crimes

Recommendation 37.

(c) Recent proposals by legal commentators to abolish the incompetency plea (and to substitute for it a trial continuance and then a trial with enhanced defense protections) are deserving of further study.

National Initiatives In Legal And Ethical Issues

Recommendation 42.

NIMH and other appropriate HEW components should fund innovative programs at law schools and mental health professional schools or other appropriate institutions which are designed to develop persons with policy, administrative and direct-service responsibilities in both the mental health and the legal system who will be knowledgeable about the delivery of services and the legal and ethical issues involved with patient care. Financial support should also be given for innovative in-service training programs at service facilities which are designed to provide continuing education for service providers concerning legal and ethical rights and for training projects for lawyers, judges, and non-lawyer advocates. These agencies should also support research into legal and ethical issues and problems, such as those highlighted in this report.

Acknowledgments

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Richard A. Millstein, J.D.

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a. John H. Lashly, Chairman, the American Bar Association's Commission on the Mentally Disabled, letter dated February 16, 1979, to Honorable Robert W. Kastenmeier.
b. The National Association for Retarded Citizens, prepared statement, February 22, 1979.
c. Rev. Msgr. Francis J. Lally, Secretary, U.S. Catholic Conference, letter dated February 21, 1969, to Honorable Robert W. Kastenmeier.
d. The National Association of Attorneys General, resolution, December 3, 1978.
e. Edward Newman, Chairman, Government Affairs Committee, the Epilepsy Foundation of America, letter dated February 21, 1979, to Honorable Robert W. Kastenmeier.
f. John Stattuck, Director, and Karen K. Christensen, Legislative Counsel, Washington Office, the American Civil Liberties Union, letter dated February 22, 1979, to Honorable Robert W. Kastenmeier.
g. Elaine R. Jones and Charles S. Ralston, Attorneys, NAACP Legal Defense and Educational Fund, letter dated February 27, 1979, to Honorable Robert W. Kastenmeier.
h. Peter W. Hughes, Legislative Counsel, The National Retired Teachers Association and American Association of Retired Persons, letter dated February 26, 1979, to Honorable Robert W. Kastenmeier.
i. Susan K. Gauvey and Ethel Zelenske, Attorneys, the Legal Aid Bureau, Inc., Baltimore, Md., letter dated March 19, 1979 to Honorable Robert W. Kastenmeier.
j. Frances B. Bicknell, Chairperson, State of Wisconsin Council on Developmental Disabilities, letter dated March 27, 1979, to Honorable Robert W. Kastenmeier.
k. Richard C. Scheerenberger, President, the America Association on Mental Deficiency, letter dated January 31, 1979, to Honorable Robert W. Kastenmeier.
l. Kenneth M. Streit, Attorney, The Wisconsin Coalition for Advocacy, letter dated March 27, 1979, to Honorable Robert W. Kastenmeier.
m. The Mental Health Association, prepared statement, February 14, 1979.
n. Althea T. L. Simmons, Director, Washington Bureau, National Association for the Advancement of Colored People, prepared statement, March 21, 1979.

AMERICAN BAR ASSOCIATION,
Washington, D.C., February 16, 1979.

Hon. ROBERT W. KASTENMEIER,
Chairman, House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The President of the American Bar Association, S. Shepherd Tate, has asked me to submit the views of the Association on H.R. 10, legislation which would authorize the Attorney General to institute suit to protect the rights of institutionalized persons.

The American Bar Association strongly supports H.R. 10. We note approvingly that this legislation is substantially identical to H.R. 9400, legislation we endorsed in the 95th Congress which overwhelmingly passed the House, but not the Senate.

The Association has long had a keen interest in the civil rights of institutionalized persons. In August, 1976, acting on a recommendation jointly developed by the Association's Commission on the Mentally Disabled and the Commission on Correctional Facilities and Services, the House of Delegates of the American Bar Association adopted the following resolution:

Resolved, That the American Bar Association urges all states to implement effective administrative procedures for resolving grievances arising out of and concerning the confinement of prisoners and the involuntary residents of men-

tal hospitals or institutions for mentally retarded persons. Such procedures should supplement but not supplant existing judicial procedures for remedying such matters.

Further Resolved, That the American Bar Association endores legislation designed to allow the Attorney General of the United States to institute suit, or intervene in pending litigation, to secure to prisoners, the mentally disabled, and others involuntarily confined the full enjoyment of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, *Provided, however*. That any such legislation should continue existing law and not require involuntarily confined persons to exhaust state administrative remedies as a condition precedent to securing relief under Section 1979 of the Revised States, 42 U.S.C. § 1983.

Thereafter, in hearings held by your Subcommittee in May of 1977, representatives of both Commissions testified on behalf of the Association with regard to the then-pending legislation. Charles Halpern, a member of the Commission on the Mentally Disabled, stated that the aims of the measure were "needed, judicious, and consistent both with federal principles and our tradition of constitutional protection of the rights and freedoms of all citizens—the meek and handicapped as well as the strong and capable." We reaffirm those sentiments today.

The Association commends and thanks you for your leadership in developing this important legislation. We believe it will significantly improve the lives of this country's institutionalized persons.

We appreciate this opportunity to present our views and we hope the Subcommittee will act promptly and favorably on H.R. 10.

Sincerely,

JOHN H. LASHLY, *Chairman*.

STATEMENT PRESENTED BY: THE NATIONAL ASSOCIATION FOR RETARDED CITIZENS

Mr. Chairman and Members of the Subcommittee on Courts, Civil Liberties and the Administration of Justice: The National Association for Retarded Citizens welcomes the opportunity to comment on H.R. 10, a most important piece of legislation. Our organization has exerted much effort to protect the rights of our nation's six million mentally retarded citizens and to improve conditions in our country's institutions for mentally retarded persons. NARC currently is composed of approximately 300,000 members who belong to our 1,900 local associations throughout the country. Just over one-half of our members are parents of mentally retarded citizens, and approximately one-quarter of our members are professionals in the field.

The NARC is pleased again to testify on behalf of H.R. 10, the bill to authorize the U.S. Justice Department to act on behalf of institutionalized persons whose rights are being violated. It is important to understand that basic rights taken for granted by most of us are blatantly violated in institutions for mentally retarded persons. Such rights include the right to privacy, the right to be free from unwarranted commitment and the right to access of methods for redressing grievances. Two years ago, Dr. Philip Roos, Executive Director of NARC and and international expert on conditions in institutions for mentally retarded citizens, eloquently testified before the Congress on the dire need for such legislation. Dr. Roos gave ample evidence of gross human rights violations being carried on in institutions throughout the country, and our organization provided this Subcommittee with a voluminous case file on this subject. We suggest a review of that hearing record for specific details.

Unfortunately, for the almost 200,000 mentally retarded persons who reside in institutions, conditions have not greatly improved in the interim. One can read the newspaper almost daily and read of gross violations of basic rights of institutionalized persons. Names like Forest Haven, Partlow, Rosewood, Willowbrook and others still make the headlines, as do many other institutions across the country. Quite frankly, most of our nation's institutions serving mentally retarded people are improving too slowly, and man continue to permit abuse and neglect to an extent which violates basic rights to be "free from harm."

Major national organizations representing handicapped people such as the United Cerebral Palsy Associations, Inc., the Epilepsy Foundation of America, and the National Society for Autistic Children, in addition to NARC, strongly endorse H.R. 10 and urge its quick passage. We simply must not allow any more

time to go by without this vital resource for protection. The United States Government must fulfill its responsibility in overseeing full protection under the U.S. Constitution. At-risk populations such as institutionalized persons, many of whom do not even know their basic rights are being violated, should be the highest priority for such protections. Clearly, institutionalized mentally retarded persons have suffered too long.

We urge you to enact H.R. 10 as soon as possible and pledge our full support to expedite such passage.

NARC is aware that opponents of this legislation contend that this is a States rights issue. We strongly disagree. The central issue is protecting the rights of all United States citizens under the United States Constitution. We can think of no group less able to assert such rights than institutionalized mentally retarded individuals. More than three-fourths of the 150,000 mentally retarded residents remaining in public institutions are severely and profoundly retarded, many with multiple handicaps such as cerebral palsy, epilepsy and blindness. These individuals are, for the most part, barely able to ask for a drink of water, much less to protest the indignities of malnutrition, sexual abuse and over-medication.

The bill's opponents argue that the State governments are equipped to handle such protections and are doing the job. If that were the case, there most likely would not be a need for these hearings. Obviously, there is a major conflict of interest between state agencies who are responsible for providing institutional services and those established to protect its citizens. In many states protective services for children will intervene to rescue a child from its parents but not when a state agency is itself responsible for the abuse. A primary duty of states attorneys general is to represent state agencies. The number of cases brought in our nation's courts by private citizens and public interest lawyers and organizations is adequate evidence that many states are not fulfilling their responsibilities, either in providing adequate care and treatment or in protecting residents' rights. However, these suits, which rely on private initiative, do not provide a vehicle for many who must go unrepresented.

The Federal Government simply must have full authority to carry out its responsibility in this area. In some cases Federal funds are flowing into states for progams which violate Federal standards relative to patient rights on the basis of state assurance of compliance. The funding agencies have no sanction except withholding funds. They also have inadequate investigatory powers to establish the validity of their suspicions and/or are unwilling to enforce appropriate care and treatment. The Justice Department has such capacity and should have the authority and standing to do so. H.R. 10 will accomplish just that.

Individuals and organizations opposed to H.R. 10 also imply that protection and advocacy units and agencies at the state level established under the Developmental Disabilities Services and Bill of Rights Act can solve these problems and the United States Justice Department intervention would duplicate such efforts. Our organization feels especially well-qualified to address this fallacy. Our organization has been intensively involved since the late sixties in the development of the Developmental Disabilities legislation and the recently established Developmental Disabilities Protection and Advocacy system. NARC has carefully monitored the development of the P and A systems and three of our state units are directly involved in administering P and A systems.

A full and thorough understanding of the role, capacity and limitations of the P and A systems is essential to an evaluation of this claim. Important as their mandate is, few if any of these systems have the capacity to mount the interventions needed where systematic violations are suspected. Here are some of the more important facts concerning the P and A systems.

1. The mandate of the Developmental Disabilities P and A systems is to protect individuals considered to be developmentally disabled. According to the Conference Report on P.L. 95-602, the recently enacted Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, the entire developmentally disabled population is comprised of approximately two million individuals. Although most mentally retarded residents of institutions would be covered under these systems, most other handicapped individuals are not protected; neither are non-handicapped children, prisoners, the aged and other classes of people to be protected under H.R. 10. Put simply, existing Developmental Disabilities Protection and Advocacy Systems have too limited a service mandate to replace United States Justice Department intervention.

2. Developmental Disabilities Protection and Advocacy Systems have a limited capacity to address systematic violations in institutions due to a lack of authority, finances and manpower. The new P and A systems are reaching a remarkable number of developmentally disabled persons who are in need of a great variety of advocacy, despite these limitations. We are attaching a tabulation of their activities for your records.

EMC Institute, Inc., which has a contract to study and provide Technical Assistance to State Developmental Disabilities Councils has gathered data describing the P and A systems. The data indicates the P and A systems have spent roughly one-half their time dealing in the right to education issue, one-quarter of their time working on individual entitlement problems such as SSI eligibility and the remainder of their time on other activities. The workload clearly is overburdening the P and A systems. NARC anticipates this situation will worsen rather than improve as more and more developmentally disabled citizens and their parents and representatives realize the existence of such a resource.

In fiscal year 1979, a grand total of $3 million is available for the fifty states and six territories. More than 40 percent of the states and five of the six territories have less than $30,000 of Federal funds to operate the systems which must protect and advocate on behalf of all developmentally disabled citizens, not just those residing in institutions. We seriously question if that amount of money will ever enable statewide systems to be established. Even if the states were to double the dollars, which some have done, there simply are too few fiscal resources to handle the tasks.

P.L. 95-602 established a minimum allocation of $50,000 for D. D. P and A systems. Under this new provision, over 60 percent of the states will be at the minimum level, and the larger states will not be able to expand their services without a substantial increase in appropriations. Unfortunately, President Carter is requesting the same $3 million for D. D. P and A systems in his fiscal year 1980 budget. The future is rather bleak as far as expansion goes.

3. D. D. P and A Systems have a huge agenda, well beyond protecting the rights of institutionalized developmentally disabled persons. A recently released study by the ABA/Commission on the Mentally Disabled of nine state P and A systems reveals a diverse spectrum of issues currently being handled. Critical issues include: right to education, zoning restrictions, guardianship, employment and housing discrimination, environmental barrier removal, criminal justice and personal and civil rights in the community as well as admission to services. All these problems and others must be coped with, in addition to institutional rights issues. It must be remembered that legal advocacy is but one of a number of authorities or activities which P and A systems are responsible to implement. The Justice Department's Office of Special Litigation's primary mission, however, is legal advocacy, and its intervention should be seen as complementing, not duplicating, P and A activities.

4. Resources to litigate are generally not available. Although the Developmental Disabilities P and A systems are now professionally staffed, some do not have attorneys or the resources to hire legal assistance to pursue litigation such as might be undertaken under the provisions of H.R. 10. Even those that do have one or more attorneys on staff acknowledge they do not have the time for full investigation, trial and appellate processes. It is crucial to recognize the vast amount of resources necessary to successfully litigate such cases.

The North Carolina P and A system, for example, even though it has been in operation for more than three years, two years longer than most Developmental Disabilities P and A systems, has never litigated a case involving a resident of an institution. ABA study data indicates class action litigation in only two or three states, and those may not necessarily involve any institution cases.

It is also important to recall certain ethical considerations facing P and A lawyers. It is reasonable to expect that they will center their activities on cases referred to them by disabled people themselves or their representatives or advocates. P and A attorneys will not be expected to go around "drumming up trade." In this sense, P and A systems are somewhat restricted in their activities. The Justice Department, though, focuses on classes of persons rather than individual cases. For these reasons, the Justice Department is clearly more capable of intervening in the type of rights violations to be undertaken under this legislation.

Another consideration is staff training. Specialized investigative skills are required to fully "discover" patterns and practices of rights violations in institutions. Most P and A lawyers do not have this training, while most attorneys in the Office of Special Litigation in the Justice Department already possess such skills.

5. P and A systems operate under certain restraints. P.L. 95-602 provides for state P and A systems to "be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities. . .". NARC assumes that this provision is complied with in the states to the extent possible. However, reality dictates certain degrees of independence. The only real clout or carrot offered to the Governor of a state to have a Developmental Disabilities P and A system is the withdrawal of Developmental Disabilities state grant funds should the P and A system not be established or be abolished. Quite frankly, this may not be such an appetizing carrot, since 60 percent of the state grant allocations are under $500,000. When compared to the millions of dollars the state spends on institutional care for mentally retarded persons alone, it is certainly understandable that a Governor might be tempted to abolish or seriously threaten the P and A system rather than face expensive and lengthy litigation. The loss of the P and A and state grant funds would be a "drop in the bucket" in most state coffers. The Justice Department, of course, has no such restraints.

6. P and A systems for severely handicapped individuals do not exist. Although authorized under P.L. 95-602, P and A systems to protect and advocate the rights of severely handicapped individuals are not yet in place, and there is little evidence suggesting that any such systems will come about in the near future. Unlike the Development Disabilities P and A systems, the P and A systems for the severely handicapped are not mandated by law. Authorization levels are not specified in the law except to place limitations on appropriations (quite low levels at that—$6 million for fiscal year 1979, $7.5 million for fiscal year 1980 and $9 million for fiscal year 1981). The Carter Fiscal Year 1980 Budget requests no funds for this purpose in either fiscal year 1979 or fiscal year 1980. The law also significantly weakens the independence of this system in comparison to the Developmental Disabilities P and A system. All in all, this potential resource simply isn't available, and its future appears rather bleak. Again, another strong argument for the passage of H.R. 10.

7. Justice Department intervention holds much greater potential for a positive reaction by the state than intervention by a state P and A system. It is simply a fact of life that political forces in power in a state are much more likely to react to intervention by an agency of the United States Government than to an agency within that state. The very threat of United States intervention may bring about effective remedies. When compared to an agency of the United States Justice Department, a state P and A system simply does not brandish the clout to bring about the necessary change.

Lawsuits brought forth by the Justice Department will also have a much greater potential to bring about statewide, and even nationwide, reactions. This cannot be said of state P and A systems.

The National Association for Retarded Citizens would like to take this opportunity to react to the Resolution concerning this legislation adopted by the National Association of Attorneys General. We bgin by noting that the Resolution fails to mention that the individuals residing in institutions have the same constitutional rights as the rest of our country's population. Our organization has fought long and hard to gain public attention to the fact that mentally retarded citizens, regardless of the degree of retardation, have the same rights under the United States Constitution as you and I do.

The United States Congress, however, recognizing the many barriers to the attainment of such rights by developmentally disabled individuals, enacted the "Rights of the Developmentally Disabled," Section 111 of the Developmental Disabilities Assistance and Bill of Rights Act. A copy of this provision is attached for your information. The provision establishes minimum standards to be met by residential programs.

We have refuted, in detail, NAAG's contention that P and A systems would duplicate Justice Department intervention.

NARC takes exception with the NAAG stance that 42 U.S.C. 1983 fully meets the needs of institutionalized persons. NARC believes that while Section 1983 grants citizens remedies if their constitutional rights are violated, it also grants governmental officials several important defenses such as a state statute of limitations, a claim that they acted in good faith, or that they could not be charged with knowledge of emerging constitutional rights.

We also view as totally unrealistic, the necessity for the Congress to finance the changes brought about by such intervention. We cannot think of any examples of the Congress attaching money strings to basic rights provision. Titles VI and IX of the Civil Rights Act, for example, didn't and still don't provide

funds to states to protect the rights of minorities and women. Sections 503 and 504 of the Rehabilitation Act of 1973, Affirmative Action in Employment and Anti-discrimination provisions, do not provide such funds. Yet they are in effect and working. Why single out institutionalized persons and this bill for such a provision? We can only consider this a delaying or impeding tactic.

A major factor not commonly understood by most people is that many of the remedies available to the states to improve their services to institutionalized people are not expensive. Some cost nothing at all. Others would have a negligible impact on a state budget. Yet some of these remedies, staff training, for example, can go a long way toward avoiding abusive treatment of the institutional residents.

NARC strongly disagrees with the recommendation of a Presidential Commission to study the issues involved. The NAAG recommends minimum standards of care. Well, institutions for mentally retarded persons have had such Federal standards since 1974, in the Medicaid ICF/MR program. This is in addition to the minimum standards in the Development Disabilities Act. Although such standards have proven useful in upgrading facilities to meet minimum quality of care, some of the institutions certified by the states as in compliance with the standards are the very ones facing litigation from the Justice Department and private advocacy groups. This fact strengthens the case for the need for H.R. 10 and as far as mental retardation facilities are concerned, nullifies the NAAG Resolution.

NAAG also calls for a national policy concerning adequate care and the development of a shared commitment of local, state and federal Government to work together to solve the problems. As far as NARC is concerned, such a national policy for mental retardation institutions has existed since the early seventies. Unfortunately, we simply cannot rely on the states to carry out their part of this policy. There simply has been no commitment on the part of many states to follow this policy.

Looking at the NAAG Resolution in perspective, NARC feels it represents a not well thought out, misleading effort to sweep this legislation under the rug. Our members plead for the Congress not to let this happen. The lives of too many innocent human beings are at stake.

NARC suggests language be added in the House Report accompanying H.R. 10 to clarify the inclusion of small public or private group homes (four or more unrelated persons) within the definition of institution. This language is very important, considering the continued de-institutionalization of the larger facilities. Placing mentally retarded citizens in smaller, less restrictive residential settings is a most worthy goal and strongly supported by NARC. However, such living arrangements do not guarantee protection from rights violations. Additionally, as more and more group homes are established, systematic monitoring of such facilities will become increasingly difficult. It is imperative, then, that coverage for those facilities be incorporated under the provisions of this bill.

The institutionalized citizens of our country, particularly those mentally retarded persons residing in institutions, have suffered from deumanizing, dangerous and inadequate care for too long. All of society must play a role in reversing these conditions. One major avenue to turning this injustice around is the passage of H.R. 10. The sponsors of this legislation are to be commended for drafting a realistic, practical solution in a difficult area. Let's give our Federal Government the opportunity to protect its most vulnerable citizens. The 300,000 members of the National Association for Retarded Citizens urge you and your colleagues to quickly enact this vital legislation.

UNITED STATES CATHOLIC CONFERENCE,
DEPARTMENT OF SOCIAL DEVELOPMENT AND WORLD PEACE,
Washington, D.C., February 21, 1979.

Representative ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The Catholic bishops of the United States have on numerous occasions expressed their concern for the rights of institutionalized persons. The U.S. Catholic Conference is therefore greatly encouraged by Congressional efforts to protect these rights through HR 10 and S 10. We believe that every person has a right to live under conditions which enhance

their human dignity and that our society shares a responsibility to ensure that right.

HR 10, the bill now before the Subcommittee, would help to protect the rights of those who are in institutions because they are mentally or physically disabled, elderly, awaiting trial or imprisoned, or juveniles receiving care for a State purpose. This legislation would do so by permitting the U.S. Attorney General to institute a civil action on their behalf.

The Catholic bishops have spoken out on behalf of these same groups of people. They have recommended that there be strict standards for the care of these individuals and that these standards be strictly enforced. In 1976, in a document entitled, *Society and the Aged: Toward Reconciliation*, the bishops called for "the establishment of stricter standards for nursing homes and strict enforcement of those standards." The bishops focused on the needs of the incarcerated in their 1973 statement, *The Reform of Correctional Institutions in the 1970s*, and made several strong recommendations to protect the constitutional and civil rights of those in prison. More recently, the bishops' Committee on Social Development and World Peace issued a document entitled, *Community and Crime* in which they advocated use of community alternatives, but also indicated that "while prisons are operative, efforts should be made to assure humane conditions for the incarcerated." In November, 1978, the bishops articulated their concern for the handicapped in their *Pastoral Statement on Handicapped People*. In it they stated "those who must be institutionalized (because of handicaps) deserve decent, personalized care and human support." The aforementioned documents are enclosed for your information.

We recognize that there are some technical differences between HR 10 and S 10. Since our primary concern is with moral rather than technical dimensions of legislation, we wish to express our support for the basic thrust of these bills with the hope that agreement on the technical differences can be achieved. We would strongly urge that the Subcommittee ensure that the provisions to protect the rights of those in prisons and jail, as well as juvenile offenders, be retained in the bill. It is unconscionable to bargain with the Constitutional rights of any population.

We thank the Subcommittee for this opportunity to comment on HR 10 for inclusions in the record. We urge its passage.

Sincerely,

REV. MSGR. FRANCIS J. LALLY.

RESOLUTION AS ADOPTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, 1978 MID-WINTER MEETING, NOVEMBER 30–DECEMBER 3, 1978, DORADO, PUERTO RICO

INSTITUTIONS BILLS

Whereas, the 96th Congress will again consider legislation which would allow the Attorney General of the United States to institute and intervene in civil actions in certain cases against state governments alleging deprivation of the constitutional rights of institutionalized persons in jails, mental hospitals, facilities for the handicapped and mentally retarded, juvenile detention centers and nursing homes; and

Whereas, persons complaining of unconstitutional conditions of confinement in institutions have legal remedies under 42 U.S.C. 1983; and thousands of such cases staffed by public interest legal organizations and by private counsel are awaiting resolution in the courts; and

Whereas, there are now in place at the state level federally funded advocacy units and agencies to deal with the special problems and rights of many institutionalized persons by means of litigation and otherwise and the efforts of such units and agencies should not be duplicated; and

Whereas, formulation of a national policy to define and protect the constitutional rights of inmates of federal, state and local institutions should be undertaken in formal consultation with state government before legislation is enacted; and

Whereas, any federal legislation such as the institutions bills of the 95th Congress which fails to provide for the financing of the changes it seeks is unrealistic, unfair and unworkable;

Therefore, be it *Resolved*, that:

(1) The National Association of Attorneys General supports establishment of a Presidential Commission to study the issues involved in the care of insti-

tntlonalized persons in local, state and federal Institutions and to recommend improvements in the operation of the institutions, including the drafting of proposed minimum standards of care; and

(2) That a national policy concerning adequate care for institutionalized persons in local, state and federal institutions should develop from a shared commitment of local, state and federal government working together to define the causes and solutions to these problems; and

(3) A study of the fiscal aspects of Institutional operations must be included in the work of the Commission to determine what financing methods are available and practicable to assure the improvement of care to at least a constitutional minimum; and

(4) The Washington Counsel of this Association is authorized to present these views to the appropriate Congressional committees and to the Administration.

EPILEPSY FOUNDATION OF AMERICA,
Washington, D.C., February 21, 1979.

Hon. BOB KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Russell House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The Epilepsy Foundation of America would like to express its support for H.R. 10, the bill to protect the constitutional rights of institutionalized individuals, and to commend you for your leadership in introducing this legislation.

We have joined with the National Association for Retarded Citizens in a statement in support of the bill which is being submitted for the record. In addition, we would like to cite the report of the Congressionally mandated national Commission for the Control of Epilepsy and Its Consequences, which said:

> At the present time, the federal government does not have authority to litigate in cases of medical maltreatment of persons who are confined to institutions for either care or treatment. Without this ability, it is virtually impossible for the government to enforce standards of care and protect the rights of institutionalized individuals. A correction of this deficiency, though, will require a specific change in federal law.

The Commission, therefore, recommended in its Recommendation #68—Independence and Equality:

> Congress should pass legislation providing statutory authority to the Department of Justice to litigate to protect the constitutional rights of persons confined to institutions or placed by the state in residential and correctional facilities, as proposed in S. 1393, H.R. 2439 or similar legislation. Such legislation should include the authority to enforce, through litigation, standards of care defined by the federal government.

We would like to express to you our deep appreciation for your effort to improve the quality of life for the 2 million Americans who have epilepsy.

Sincerely,

EDWARD NEWMAN, PH.D.,
Chairman, Government Affairs Committee.

AMERICAN CIVIL LIBERTIES UNION,
Washington Office, February 22, 1979.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: We are writing to you on behalf of the American Civil Liberties Union regarding H.R. 10, the bill to give the Attorney General authority to enforce the rights of institutionalized persons.

The American Civil Liberties Union is a non-partisan organization of more than 200,000 members. As an organization devoted solely to the protection of individual rights and liberties guaranteed by the Constitution, we regard H.R. 10 as one of the most important pieces of legislation presently before Congress and we would like to take this opportunity to comment on the bill.

As an organization, the ACLU is directly involved in protecting the constitutional and civil rights of persons confined in institutions. A major focus of the activities of the National Prison Project and of the Juvenile Rights Project of the ACLU is the representation of incarcerated adults and children. The Mental Health Law Project, sponsored in part by the ACLU, represents mentally handicapped children and adults. In addition, ACLU affiliates and their attorneys throughout the country advocate and litigate on behalf of a wide variety of institutionalized persons.

The collective experience of the ACLU has demonstrated the need for legislation which will allow the Attorney General to act vigorously and constructively to protect the rights of mentally and physically handicapped persons, the elderly, juveniles, and other persons confined to state institutions.

Regrettably, in numerous instances, persons who are confined in state institutions are forced to endure practices and conditions which violate their constitutional rights and which they are powerless to compel change. While on occasion, the news media has focused public attention on the horrors and abuses which exist in nursing homes, prisons, mental hospitals or other places of confinement, acknowledgment by the public that problems exist is never enough. Residents of institutions rarely have sufficient political influence successfully to negotiate with state agencies or legislatures concerning the upgrading of their conditions of confinement and treatment. State attorneys general, charged with representing state agencies and employees, are often caught in a conflict of interest and cannot assist institutionalized persons. Thus, the problems persist. Severe overcrowding, inadequate medical care, unsanitary and sometimes dangerous physical structures, abuse and violence, and inappropriate use of tranquilizing drugs continue to jeopardize the health and safety of persons subjected to institutional life. In many instances, private plaintiffs cannot afford the enormous cost of bringing these conditions to light in the courtroom. Even with the assistance of public interest groups, such as the projects of the ACLU which provide advocacy for clients in institutions, it is increasingly costly and burdensome to prove in conrt the nature and extent of constitutional violations on an institution-wide or system-wide basis.

The vigorous participation of the Attorney General can help bear the burden of enforcement litigation where important rights of large numbers of institutionalized citizens are being violated. H.R. 10 does not create new substantive rights for persons confined in state institutions. It simply gives the Attorney General statutory authority to initiate or intervene in a civil rights action on behalf of institutionalized individuals. Thus, it puts these persons on the same footing as other disadvantaged groups who may invoke the assistance of the Attorney General when their constitutional rights are threatened.

The role of the Federal Government as a guarantor of basic civil rights against state power is clearly established by the Fourteenth Amendment to the Constitution. Enactment of this bill would not result in unwarranted federal intrusion into state administration of prisons, mental hospitals, juvenile facilities and similar institutions. The bill simply allows the Attorney General to present the issues to a court in an action concerning conditions of confinement. The federal courts, charged by the Constitution with the responsibility of determining and protecting the civil rights of all citizens, would continue to be the final arbiters of whether the constitutional rights of confined citizens have been violated.

The National Prison Project and the Mental Health Law Project have testified concerning H.R. 10 and proposed amendments, which we urge you to adopt, to put the civil rights enforcement efforts of the Attorney General with respect to institutionalized persons on the same footing as his enforcement powers in other civil rights areas. Institutionalized citizens enjoy the same constitutional rights as all other citizens. The effect of this bill should not be to diminish or detract from these rights, but rather, to help to fulfill our nation's promise of justice for all.

We hope that our comments are helpful to the Subcommittee as it begins to mark up H.R. 10, and we thank you for the opportunity to present our views

Yours sincerely,

JOHN SHATTUCK,
Director.
KAREN K. CHRISTENSEN,
Legislative Counsel.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
Washington, D.C., February 27, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn House Office Building, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: At your request, I am providing the comments of the Legal Defense Fund on H.R. 10, dealing with actions brought to redress the deprivations of rights of institutionalized persons.

1. The Bill would restrict the Attorney General in bringing actions on behalf of inmates of jails, prisons, or other correctional facilities to those cases where the deprivation was of constitutional rights. Thus, such actions could not be commenced if prison conditions violated federal statutes or regulations. We do not understand the basis for the distinction between prison inmates and other categories of inmates. If conditions violate federal law and if the other conditions set out in the statute are satisfied, then the federal government should have the authority to enforce the rights of persons confined in violation of law.

2. The same section of the Bill limits suits to those where inmates suffer "grievous harm" in addition to being deprived systematically of federal rights. However, the Bill nowhere defines what "grievous harm" is; nor does it indicate what the phrase adds to the requirement that there be a pattern or practice of deprivation. We are concerned that the term may be defined so broadly as to restrict severely the number of cases which the government may bring.

3. Section 3 of the Bill requires a certification by the Attorney General. We would first point out that the requirements are considerably more stringent than those in other civil rights statutes. Second, it should be made clear that the "reasonable time" requirement in Sec. 3(a)(3) refers back to the 30-day period referred to in 3(a)(1). Third, there should be no certification requirement before the government may intervene in a private action, since the pendency of that action itself would provide ample notice to state officials of the alleged pattern or practice of deprivations and what should be done to correct it.

4. We generally oppose conditioning the maintence of private litigation under 42 U.S.C. § 1983 on any exhaustion of administrative remedies as a significant diminution of existing rights. However, if resort to a grievance procedure for ninety days is to be required we have the following comments. First, the condition should not be imposed on pre-trial detainees since they are presumed innocent. Therefore, they should be treated the same as all other categories of inmates in state institutions who have not been convicted of a crime. Second, th certification by the Department of Justice must be more than approval because a grievance system conforms on paper with its published standards. A thorough investigation and monitoring of the actual operation of a grievance system is essential, particularly as it relates to the protection of inmates from reprisals for filing a grievance. Third, there should be a clear exemption from the referral requirement in cases where the plaintiff has alleged that there are life-threatening circumstances or denials of constitutional rights (such as free speech, access to the courts, etc.) requiring immediate corrective action.

5. It should be made clear, either in the Bill or in the legislative history, that the government continues to have the right to intervene in actions pursuant to the Federal Rules of Civil Procedure. Much of the litigation that has established the rights of prisoners and inmates of other institutions has been brought and supported by private organizations such as the Legal Defense Fund and the American Civil Liberties Union. Prison cases typically go on for years and the resources of these organizations are limited. Against them are arrayed the resources of the states, in terms of both finances and manpower. Intervention by the Department of Justice in selected cases can go far to redress the imbalance.

Sincerely yours,

ELAINE R. JONES.
CHARLES STEPHEN RALSTON.

NATIONAL RETIRED TEACHERS ASSOCIATION.
AMERICAN ASSOCIATION OF RETIRED PERSONS.
Washington D.C., February 26, 1979.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: Our attention has been drawn to H.R. 10, a bill to authorize actions by the Attorney General of the United States for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States. Our special interest in this Bill relates to the definition of the term "insitution" which—"means any facility or institution—

(A) which is owned, operated, or managed by or provides services on behalf of or pursuant to a contract with, any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentaliy ill, disabled, or retarded, or chronically ill or handicapped;

* * * * * * *

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care;"

The Bill would provide standing for the Attorney General to institute a civil action for equitable relief where persons confined to such institutions are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States, provided that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges or immunities. Adequate provision is made, we believe, for consultation, prior to such action, with appropriate officers of the State or political subdivision of the State and the director of the institution where such pattern or practice is claimed.

We are concerned with those instances where a pattern or practice of deprivation may exist through the disregard or inattention of State or local officials and through the inability of persons located in such institutions to adequately enforce their own constitutional rights. We approve of the limitation on the action of the Attorney General to cases involving a pattern or practice of deprivation.

We have given strong support to the development of ombudsmen in nursing homes throughout the nation and we feel that passage of H.R. 10 will help to support the activity of ombudsmen where the efforts of the ombudsmen have failed to bring about a correction of an abuse.

The twelve million members of the American Association of Retired Persons and the National Retired Teachers Association hope that your Subcommittee and the entire Judiciary Committee will again support this legislation and that it will receive similar treatment in the Senate.

We will appreciate it if this letter can be made a part of the hearing record on H.R. 10.

Sincerely,

PETER W. HUGHES, *Legislative Counsel.*

LEGAL AID BUREAU, INC.,
Baltimore, Md., March 14, 1979.

Re H.R. 10, Rights of Institutionalized Persons.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: We are legal services attorneys with the Mental Health Project of the Legal Aid Bureau, Inc., a statewide legal services program serving 12 counties, and Baltimore City in Maryland. The Mental Health

Project specializes in legal problems involving mental health issues and handles individual cases as well as class actions. Although some of our clients reside in the community, many clients are residents of facilities for the mentally ill and mentally retarded, of nnrsing homes, and of other residential facilities. On behalf of our clients, we strongiy support the passage of H.R. 10.

Advocacy agencies, pubiic interest iegal organizations and private counsel have not been ahle adequately to prevent abuse and exploitation. This legislation would more fuily protect the rigbts of institutionalized persons and provide the resources necessary to carry on complex and lengthy litigation.

The Mental Health Project and the Juvenile Law Unit of tbe Legal Aid Bureau recently tried a case which exemplifies the need for iegislation such as H.R. 10. In *Johnson* v. *Solomon*, C.A. Y–76–1903 (D. Md., filed December 13, 1976), the Legal Aid Bureau filed a class action suit on behalf of a group of children under the jurisdiction of jnvenile courts who are confined in state mental hospitals. The membership of the class constantly changes and the size fluctuates from 70 to 100. Defendants included the Maryland Department of Health and Mental Hygiene, the Juvenile Services Administration, the Department of Human Resources and a class of ail juvenile court judges in Maryland.

Plaintiffs' claims are grounded upon the Fourteenth Amendment of the United States Constitution and the Maryland Juvenile Causes Act, MD. CTS. & JUD. PROC. CODE ANN., §§ 3–801, *et seq.* Plaintiffs allege that class members are committed to state mental hospitals hy juvenile court judges throughout the State of Maryland without certain procedural safeguards including a constitntionally adequate commitment standard, periodic review of the continued need for their hospitalization and representation of counsel at all stages of the commitment process. Plaintiffs also allege that they are not receiving appropriate treatment in the least restrictive setting.[1]

Plaintiffs allege that a majority of class members are inappropriately hospitalized and would be more appropriately treated in alternative placements less restrictive than a mental hospital, that an insufficient numher of alternative settings for class members exist in Maryland resulting in inappropriate and longer than necessary hospitalization for many.

Evidence was presented regarding the harm resulting from inappropriate hospitalization including the administration of inappropriate treatment. A review of hospital records of 76 class members hospitalized on or ahout February 6, 1978, resulted in a class profile. Thirty-Eight of the 76 class members were housed on aduit units. Upon admission, 54 of the 76 class members were diagnosed with non-psychotic disorders, tbe most prevalent being non-psychotic reactions to adolescence. Although the vast majority of ciass members were diagnosed as non-psychotic, 70 of the 76 ciass members were prescribed psychotropic or other mood-altering drugs at some point during their hospitalization. Fifty of the 70 were prescrihed these drugs upon admission. Expert witnesses for plaintiffs testified that use of these drugs was not heneficial in the treatment of many class members. Fifty of the 76 class members were placed in seclusion on one or more occasions; 26 of the 50 were placed in seclusion for continuous periods of 24 hours or longer, some for as long as four days at a time.

In addition, plaitiffs' experts testified regarding tbe lack of appropriate treatment in mental hospitals, the separation from family and community and the deterioration in the mental health of the children caused hy hospitalization.

In short, the evidence showed serious deficiencies in hospital care as weli as that a large number of children clearly did not require institutional care and that institutionai care was detrimental to development.

As was evidenced from the above description, the scope of the case was quite iarge and required enormous expenditures of time and money. Five Legal Aid attorneys and four paralegals actively participated in preparation of the case for nearly two years. For nine months, one attorney spent most of her time working on the case. One paralegal was hired to devote all of her time to the case for a six month period. Eight sets of interrogatories and four requests for production, inspection and copying of documents were served by plaintiffs. Plaintiffs took 13 depositions and defendants took depositions of plaintiffs' seven experts which reqnired travelling to the states where the experts reside. At trial, plaintiffs

[1] The court originaiiy denied Plaintiffs' Motion to Amend the Complaint to include a claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. However, at the pre-trial conference, the court stated that plaintiffs should present their evidence on this claim for the court's consideration.

presented six expert witnesses and defendants presented 11 factnal and expert witnesses. The total cost of the case excluding the salaries of staff was nearly $15,000.

Clearly the present system is not adequate to protect the rights of or to provide adequate remedies for institutionalized persons. The Legal Aid Bureau's financial situation and the interests of competing client groups preclude it from filing too many suits like the *Johnson* case. Currently, there is a deficit in the program's finances. Large cases on behalf of institutionalized persons present a serious "cost" to the program. Because of the competing interests of different client groups, the Bureau must allocate its restricted financial and personnel resources. Furthermore, the amount of time needed to prepare a case like *Johnson* including investigation, discovery, research, drafting, etc., necessarily means that the attorneys and paralegals will be able to spend less time working with individual clients. In the future, the Bureau may decide that it is not feasible to file a lawsuit on behalf of institutionalized persons.

The Legal Aid Bureau is fortunate in that it can file suits such as the *Johnson* case. However, many smaller legal services programs and private practitioners do not have the funding or staff to consider large class action suits on behalf of institutionalized persons.

H.R. 10 would rectify these problems. It would mean that in areas where local programs and organizations are unable to handle the financial and staffing burdens of large scale class action suits, the Department of Justice which has the resources could bring the suit. This would mean that residents of institutions who have been deprived of their rights under the present system would have their constitutional and federal rights protected. In addition, H.R. 10 would be beneficial in areas with larger legal services programs. The financial and staffing resources of the local program would not be so heavily burdened by these large cases and would enable them to serve more individual clients.

Furthermore, it is likely that more cases could be settled prior to trial if the Department of Justice were representing institutionalized residents. In *Johnson* plaintiffs' attorneys attempted to settle the case for six months. The attempts were unsuccessful. Clearly, the involvement of the United States government would be a psychological aid to encourage settlement.

Thank you very much for this opportunity to comment on H.R. 10 on behalf of our clients. Please include these remarks in the record of the committee's consideration of H.R. 10.

Sincerely,

SUSAN K. GAUVEY,
Chief Attorney, Mental Health Project.
ETHEL ZELENSKE,
Staff Attorney, Mental Health Project.

STATE OF WISCONSIN COUNCIL ON DEVELOPMENTAL DISABILITIES,
Madison, Wis., March 27, 1979.

Hon. ROBERT KASTENMEIER,
Rayburn House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: The Wisconsin Council on Developmental Disabilities wishes to reaffirm its support for H.R. 10 (S. 10), which authorizes the U.S. Attorney General to initiate a civil action for equitable relief in any appropriate United States District Court when he has reasonable cause to believe that any state or its political subdivision, any official, employee or agent, is subjecting residents confined to institutions to conditions that deprive them of rights protected by the U.S. Constitution. The deprivation must be pursuant to a pattern or practice.

At the time the Council supported the bill introduced by you in last year's session, Wisconsin, to our knowledge, did not present a problem.

As a result of site visits on the part of the Wisconsin Coalition for Advocacy, Inc., created by P. L. 94-102, a serious problem at Milwaukee County Mental Health Institute, North and South Division, has surfaced.

North Division, which is the psychiatric unit, has 35 developmentally disabled residents, at a cost of $160 per day per resident, who receive medication only and no treatment. This cost is met from state and county funds. The attitude of the Superintendent is that these residents would not benefit from treatment. This

assessment runs counter to all contemporary research that they can and do benefit from treatment.

A similar situation exists in the South Division, which is a nursing home and infirmary. There, again, the developmentally disabled receive medication only and no treatment. The cost for South Division is $85—$104 per day per resident.

The Coalition has reported similar conditions among the 307 residents at Southern Center for the Developmentally Disabled who receive no programming whatsoever. The cost per resident at Southern Center is approximately $30,000 per year from state and county funds.

These reports confirm our belief in the value of your proposed legislation to the neglected residents in our institutions.

Both the Council and Advocacy Coalition will be glad to supply you with any further information or data you might wish.

Sincerely,

FRANCES BICKNELL, *Chairperson.*

AMERICAN ASSOCIATION ON MENTAL DEFICIENCY,
Washington, D.C., January 31, 1979.

Hon. ROBERT KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I was pleased to learn you introduced H.R. 10, the legislation to protect the rights of institutionalized persons. As President of the American Association on Mental Deficiency (AAMD), I am writing to express the continuing support of our organization for this important civil rights measure.

I was disappointed to see how the threat of a filibuster and other delaying techniques were successful in preventing the Senate from voting on the legislation in the 95th Congress. I do hope that this does not happen again this Congress.

As you may know, the American Association on Mental Deficiency has been devoted for more than 102 years to standards of excellence in professional services which improve the quality of life for mentally retarded individuals as well as to advocating appropriate services for mentally retarded and other handicapped persons. On behalf of more than 12,000 professional members, I call your attention to our commitment in bringing about a coordinated delivery system.

Let me know of whatever help I can provide to you on this crucial matter of national importance.

Yours truly,

RICHARD C. SCHEERENBERGER, Ph. D., FAAMD, *President.*

WISCONSIN COALITION FOR ADVOCACY,
Madison, Wis., March 27, 1979.

REPRESENTATIVE ROBERT KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: Thank you for your efforts on behalf of residents. As Wisconsin's Protection and Advocacy agency for persons who are developmentally disabled, we appreciate the additional resources which H.R. 10 will provide to such persons if they should be needed. Having visited all three of Wisconsin's Centers for Developmentally Disabled, it is my observation that, while the conditions at those facilities are certainly not ideal for the residents, I have not yet observed the gross abuses which were apparently the subject of a number of the cases in which the U.S. Justice Department had previously been involved on behalf of the plaintiffs.

It has, however, been my observation that a number of residents of those Centers continue to receive only a token amount of assistance in developing their potential. A number of other residents have remained in the facilities (at approximately $30,000 per year in Title 19 funds) because of the unavailability of appropriate community alternatives.

It is my hope that H.R. 10 will soon be adopted by Congress. It is also my hope that the rights of persons currently living in institutions will also continue to be addressed by Congress through approaches which facilitate and en-

courage those individuals from these institutions to be appropriately transferred to community residences where they can receive necessary developmental programs.

Sincerely,

KENNETH M. STREIT,
Attorney at Law.

NATIONAL BAR ASSOCIATION,
Washington, D.C., April 23, 1979.

Hon. ROBERT W. KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR SIR: The National Bar Association, the oldest and largest national organization representing and serving Black attorneys and jurists, fully supports the provisions of H.R. 10 and urges the U.S. House of Representatives to enact this Bill.

Throughout its 54 year history the National Bar Association has given major emphasis to protecting the civil rights of all citizens. Our experience indicates clearly that institutionalized persons are especially vulnerable to rights deprivations and are least able to pursue redress. In many instances, financial and other resources to initiate private investigations and litigation is limited or totally lacking as is the cooperation of the institutions involved. Thus, federal intervention quite often is the only viable recourse for redress in situations where violations of the rights of institutionalized persons is suspected or alleged.

We are especially supportive of the inclusion of correctional facilities among the institutions covered by the Bill and of the provisions for the promulgation of federal standards for effective grievance procedures in correctional facilities. That conditions exist within penal institutions which transgress the Constitutional rights of persons confined to those institutions has been well documented by members of our organization and others. We feel strongly that correctional facilities must be subject to the provisions of H.R. 10.

Very truly yours,

JUNIUS W. WILLIAMS,
President.

STATEMENT OF THE MENTAL HEALTH ASSOCIATION ON H.R. 10 CIVIL RIGHTS FOR THE INSTITUTIONALIZED SUBMITTED BY HARRY EBELINO, MEMBER, COMMITTEE ON LEGISLATION AND SERVICES, THE MENTAL HEALTH ASSOCIATION, ARLINGTON, VA.

SUMMARY OF FULL STATEMENT

The Mental Health Association wholeheartedly supports H.R. 10. Patients in mental institutions often have very little contact with the outside world, sometimes due to the neglect of relatives and friends, and often due to the policies of the institution in which they reside. This has frequently resulted in the inability of private citizens to discover and document in court the widespread abuses of patients' rights in many mental institutions. The Mental Health Association, having been involved in a number of cases in which the courts have found a pattern and practice of patient abuse, has seen much improvement resulting from litigation, but realizes the limitations of suits initiated by private parties. We anticipate that the number of court cases filed by mental patients will actually be reduced if this bill is enacted, because the need for individual suits will be reduced as States respond to Justice Department suits alleging patterns and practices of abuse. The Association also anticipates that the need for greater oversight will become even more acute in the future, because as more patients leave State institutions for treatment facilities in community settings, only the most seriously ill will generally be left in the large State institutions.

Information on the Mental Health Association

The Mental Health Association is the national citizens' voluntary organization of one million members representing the consumers of mental health services, and working toward improved methods and services in research, prevention, detection, diagnosis, and treatment of mental illness; and for the promotion of mental health. We have long been involved in efforts to improve conditions in mental institutions; in fact, an organized mental health movement was founded in 1908 by Clifford Beers, who had personally suffered many abuses during his long confinement in several mental institutions.

Rights of patients in mental institutions

In supporting H.R. 10, the first issue I would like to address concerns the rights that institutionalized patients are allowed by State statutes or regulations. Perhaps fifteen to twenty States, for example, have visitation rights clearly spelled out, while the rest have only vague statutes or regulations which allow the directors of institutions the discretion to choose when and how many—if any—visitors a patient may see. Whenever patients' rights of any kind are not clearly elucidated by statute or regulation, each patient must negotiate for his rights each time he wishes to assert them, and this often results in a denial of constitutional rights to patients.

The adoption of State regulations does by no means guarantee that patient abuses will stop, or that the standard of care in an institution will meet minimum standards of decency. The amount of actual treatment patients receive at most State institutions is minimal, resulting in purely custodial care for the majority of patients in State mental institutions.[1] The nutrition provided patients is frequently inadequate, and the living conditions unsanitary and unsafe. These conditions have been highlighted by court cases in several States, the most well-known of which is *Wyatt* v. *Stickney*, dealing with institutions for the mentally ill and mentally retarded in Alabama. The Mental Health Association filed as *amicus curiae* in that case.

The effect of litigation

Not all mental institutions are operated in such a way that deprives patients of their Constitutional right. Of course, these institutions and the states which operate them would not have to fear the initiation of a suit by the Justice Department. However, it is our view, resulting primarily from our involvement as *amicus curiae* in a number of cases, that litigation is a very effective way of prompting those states with inadequate standards and commitment procedures to upgrade their standards and procedures. This was accomplished in Alabama by issuing new regulations and spending more money on the institutions. In Pennsylvania, the Association filed *amicus* in the case of *Bartley* v. *Kremens*, in which the District Court found then-existing state commitment procedures unconstitutional, as they deprived minors of due process.[2] Although the state of Pennsylvania appealed this decision, it also changed its statutes in a way which conformed to the District Court's judgment. And finally, the Supreme Court's decision in the *O'Connor* v. *Donaldson* case—in which the Mental Health Association filed *amicus*—has had and will continue to have a profound effect on the ability of mental institutions to keep patients against their will. The Court held unanimously that a "finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."[3] The Mental Health Association, then recognizes the great potential for progress through litigation. However, we are also well aware of the severe constraints, due to lack of legal resources, placed on the initiation of suits by private parties.

Without the authority to initiate suits that this bill would grant the Justice Department, many institutions across the nation will be allowed to continue practices which deny the Constitutional rights of their patients. I need not discuss the negative impact of the *Solomon*[4] and *Mattson* decisions, as those cases provided the impetus for the introduction of this bill. Let me add, however, that the need for Justice Department initiation of suits is growing as the number of qualified attorneys willing or able to take such cases grows smaller. Few public or private attorneys have the time and resources to pursue extensive litigation on behalf of patients' groups. Community legal services associations have seen their funds shrink significantly, and they have discontinued the few legal services they had formerly provided to institutionalized persons. In sum, it is the belief of the Association that without additional legal and investigative resources used in behalf of institutionalized persons, many institutions across the country which deprive their patients of Constitutional rights will be allowed to continue their practices without any legal sanctions.

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[1] Bruce Ennis, "The Implications of O'Conner vs. Donaldson," unpublished paper presented to the 1975 ADAMHA annual conference, p. 9.
[2] *Bartley* v. *Kremens*, 402 F. Supp. 1039 (E. D. Pa. 1975).
[3] *O'Connor* v. *Donaldson*, 45 L. Ed. 2d at 406–407.
[4] *U.S.* v. *Solomon*, 419 Fed. Supp. 358 1976 No. 76–2184 4th Circuit, Oct. 12, 1977.

Safeguards to protection of State's interests

It is important to note that prior to instituting any litigation the Attorney General is required by the proposed Legislation to take certain steps to accomplish the protection sought, by informal means and to give certain notices.

Section 2 requires 30 days notice to Governor, Attorney General, and the Director of the Institution concerning the conditions, the facts, the remedies giving rise to the proposed compiaint. The notice must also allege the efforts made to consuit with such officiais regarding assistance availabie from the United States, the pattern or practice of resistance, efforts to remedy by informal method, the reasonable time afforded to correct the conditions, and the action contemplated by a general public interest.

The testimony of the Attorney General's Civil Rights Section on S. 1393 in the 95th Congress,[5] the standards by which all Civil Rights actions are measured is similar and there is ample evidence by looking at the history of such litigation that the authority has not been abused.

The effect of H.R. 10 on the courts

No one can really predict how many suits the Attorney General would initiate if this bill were passed. However, we feel that the bill has adequate safeguards against "fishing expeditions" by the Department. The Attorney General must feel that the alleged abuses are widespread and serious enough to warrant a suit initiated in the public interest. We believe that the legislation would deal only with the most aggrievous situations, where the treatment provided by the facility is clearly deficient.

We also support the contention that the number of individual lawsuits will be reduced if this bill is enacted. Experience has already shown, in the Estelle case involving prisons in Texas, that individual suits can be consolidated if the Justice Department intervenes. If the Department could initiate suits, individual cases which might arise from an institution could be averted in many instances. In addition, as more states adopt new regulations and standards in response to Justice Department pressure and court rulings, the need for litigation in those states will be reduced. The notification of state mental health officials before suits are filed might frequently stimulate the institutions in question to upgrade their standards and procedures in order to avoid a legal battle with the Justice Department.

The shift to community care

I would like to make one final point bearing on this bill. Over the past two decades, there has been a dramatic shift in the patient population, from large state mental institutions to small, community-based treatment facilities, a shift for which the Mental Health Association has worked diligently. Largely because of Community Mental Health Centers and other community facilities, the number of patients in state mental hospitals has dropped from 559,000 in 1955 to fewer than 250,000 today, a decrease of more than 50 percent. This trend raises two issues. First, as the patient population in state institutions declines, those patients remaining will tend to be only the most severely ill in the society. These are precisely the patients for whom greater oversight is a necessity, as they are least able to fend for themselves. Second, it is important that community facilities not be exempt from Justice Department investigation and action if the need arises, because those facilities are where an increasing proportion of the patients will be. Therefore, we endorse the language in H.R. 10 which defines an institution as "any treatment facility for mentally ill, disabled, or retarded persons."

ATTACHMENT A

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., July 28, 1977.

Hon. BIRCH BAYH,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN BAYH: During my testimony before the subcommittee on June 17, 1977, concerning S. 1393, I was asked what guidelines might be followed by the Attorney General in our litigation program concerning the constitutional

[5] Letter from Drew S. Days, III, Assistant Attorney General, to Subcommittee on Constitution, dated July 28, 1977. S. Report 95–1056, Appendix A, p. 32–4. (See attachment A.)

rights of institutionalized persons in determining whether to institute a suit and, if so, what relief might be obtnined.

1. Standards for filing suits

As I stated in my testimony, the participation by the United States in suits such as contemplated by S. 1393 has been largely at the invitation of courts to appear as *amicus curiae* or through intervention iu pending litigation instituted by private individuals. However, the Department has initiated a small number of suits where no private action was pending, based upon the theory that the Attorney General has inherent authority to bring suit to protect the interests of the United States, n theory which has long been accepted by the courts in other contexts. We have determined that the interests of the United States required the initiation of a suit wbere the following fnctors are present:

1. A significant number of individuals are being subjected to deprivations of rights secured to them by the Federal constitution or Federal statutes;

2. Such deprivations are pursuant to broadly applicable policies, procedures or practices;

3. Such deprivations are of an extremely serious nature, so as to include, but not be limited to, at least one of the following:

(*a*) Individuals are confined under conditions which amount to "cruel and unusual punishment," within the meaning of the 8th amendment,

(*b*) Individuals are subjected to confinement or to other severe restrictions of liberty without lawful justification, *e.g.*, failure to provide treatment to persons committed for the purpose of being treated,

(*c*) Individuals are denied basic freedoms, *e.g.*, freedom of speech, freedom of religion, freedom to petition the government (including reasonable access to the courts); and

4. There is no realistic prospect of an effective, timely remedy without the involvement of the United States.

We would expect to follow similar guidelines if a bill such as S. 1393 becomes law. I do not believe that it is necessary to iucorporate such guidelines in the legislation itself. As I stated in my testimony, the Attorney General has had "pattern or practice" authority for some time in other areas of civil rights enforcement, and the Department of Justice has therefore had extensive experience in operating under that staudard. I believe that the guidelines which I have outlined wonld meet the "pattern or practice" standard. The subcommittee conld, however, include in its report on the bill language indicating its understanding of this term.

2. Relief

During my testimony, concern was expressed about the scope of the language of section 1 of S. 1393 which authorizes the Attorney General to institute a civil action for such relief as he deems necessary to insure the full enjoyment of any rights, privileges, or immunities secured by the Constitntion or laws of the United States by persons confined in an institution. This language is quite similar to that of many other civil rights statutes which authorize civil actions by the Attorney General, *e.g.*, 42 U.S.C. 2000a–5 (discrimination in public accommodations); 42 U.S.C. 2000b (discrimination in public facilities); 42 U.S.C. 2000c–6 (desegregation of public education); 42 U.S.C. 2000e–6 (discrimination in employment); and 42 U.S.C. 3613 (fair housing). This language would, therefore, have established meaning and its use would serve to insure that, in an appropriate case, the Attorney General would not be limited in his authority to seek full relief for any violation which is within the terms of the statute.

It is, of course, the court in which snit is brought which would determine the extent of relief which would be granted to remedy a violation of constitutional or statutory rights. Thus, although the language of S. 1393 gives authority to the Attorney General to seek such relief ns he deems necessary, tbe courts, under general equitable principles, would be required to fit the remedy to the violation which is proved. For example, in recent decisions involving conditions in prisons, courts have ordered relief which corrected unconstitutional lack of medical care, required internal due process for imposition of disciplinary measures and placed population ceilings on institutions which were so overcrowded as to amount to cruel and unusual punishment. Where conditions exist which violate the constitution, an injunctive order mnst be entered which would cause the conditions to be brought within constitutional limits.

The constitutional standards as interpreted by the courts are, of course, the measure of violations of constitutional rights. Frequently, however, the trial

courts have been guided in determining what constitutes unconstitutional conditions by evidence of acceptable norms for institutions published in the form of "standards." The expert witnesses who have testified in our litigation concerning correctional facilities have referred primarily to the following published standards as measures of the minimum conditions which should exist in those institutions: the American Public Health Association's Standards for Health Services in Correctional Institutions (1976), the American Medical Association's Standards for the Accreditation of Medical Care and Health Services in Prisons and Jails (1977), and the American Correctional Association's Manual of Correctional Standards (1973).

In the area of non-correctional institutions, the Department of Health, Education, and Welfare, which grants substantial financial assistance to such institutions, has prescribed, pursuant to the authority conferred in 42 U.S.C. 1302, "Standards for Intermediate Care Facilities," 45 C.F.R. 249.13. Those "standards" are a useful and frequently applicable measure of minimal requirements for facilities in which mentally retarded, mentally ill, and aged persons are confined.

Thank you for the opportunity of appearing before your subcommittee. If I can be of further assistance, please feel free to contact me.

Sincerely,

DREW C. DAYS III,
Assistant Attorney General,
Civil Rights Division.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Washington, D.C., March 20, 1979.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The National Association for the Advancement of Colored People is submitting the attached statement of its view on H.R. 10, legislation which would authorize redress to protect the rights of institutionalized persons.

We appreciate this opportunity to present the Association's views and hope the Subcommittee will act favorably on H.R. 10.

Sincerely yours,

ALTHEA T. L. SIMMONS,
Director, Washington Bureau.

Attachment.

STATEMENT OF ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of the subcommittee, thank you for this opportunity to present our views in favor of H.R. 10, a bill which would authorize redress to protect the rights of institutionalized persons.

The National Association for the Advancement of Colored People long ago learned that it is virtually impossible for an individual to adequately protect his civil and constitutional rights when the full force of the state is brought to bear to deny or to limit those rights. We also know that the resources of such organizations as the Association that have done so much to fill the void in the area of legal representation of blacks and other minorities, the poor and the oppressed, are woefully inadequate to uncover, much less prevent, the many abuses that occur in places of confinement such as jails, mental institutions, juvenile homes, etc.

We have strongly supported Federal legislation that would protect the basic rights of our citizens, as is indicated by successful efforts to obtain passage of the Civil Rights Acts of 1957, 1960, 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968 and other laws enacted pursuant to the 13th, 14th and 15th Amendments. We are proud that the NAACP's leadership in securing passage of this monumental legislation and its victories in the courts have spearheaded a new awareness among other groups that has resulted in increased protection of the rights of women, other minority groups, the aged, the handicapped, and juveniles. The time has now come to recognize the special problems of the institutionalized and to give them the benefit of Federal protection. Therefore, we wel-

come the introduction of H.R. 10 and its companion bill in the other body, S. 10, and are pleased to lend our suport to the principles of this legislation.

We think that the need for a law giving clear authority to the Department of Justice to act to protect the righs of institutionalized persons has been amply demonstrated.

Assistant Attorney General Days has shown the difficulties encountered by the department caused by the present confused state of the law. The hearing reports on this bill and its predecessor in the 95th Congress, as well as the opinions in the cases in which the department has participated, show overcrowding, inadequate care, abusive treatment, racial segregation, shoddy medical treatment, misuse of drugs, excessive violence against inmates by employees, sexual assaults and general neglect amounting to massive denial of constitutional rights of persons in confinement.

We are concerned that a disproportionate share of those subject to this illegal treatment are blacks, due to the nature of onr social and economic systems, and more importantly, to the past denial to them of equal protection and due process of law.

We find it significant that Judge Frank Johnson of the United States District Court in Alabama found it necessary to, in effect, take full control of that State's prison system because of gross denials of inmates' Constitutional rights during the incnmbency of a governor who has perhaps the most racist public record of any American public figure of our time. To us, this signifies that denial of rights is most likely to occur when that denial bears more heavily on blacks than the rest of the population.

To those who say this is a matter that should be left to the states, our response is that the same argument has been made against every civil rights bill that has been introduced in Congress. Had this argument been accepted as valid, little of the remarkable progress in civil rights made in the last 25 years would have been achieved. An additional basis for rejecting this argument is that we are discussing violations of law by state officials, in many instances officials appointed by the governor of the particular state. It is self-evident that corrective action by other state officials would be approached cautiously, if at all. Therefore, we ask this Congress to once again reject this specious argument.

We will not discnss the varions technical provisions of the pending bill; rather, we wish to record our support of an effective statute that will fully protect the Constitutional rights of persons unfortunate enough to be confined to an institution for whatever reason. We support the position of the Department of Justice that inmates of penal institutions should not be exempted from coverage of the bill. As we have previously noted, blacks are disparately represented in the prison population of the nation due to the historical mistreatment and denial of rights to which they have been subjected. These and all others who are imprisoned should not be punished beyond their sentences by being subjected to additional unconstitutional abuse while paying their debts to society.

Mr. Chairman and members of the subcommittee, the NAACP urges prompt action to report and pass the bill under consideration in a form that will best protect persons who are institutionalized.

APPENDIX 5—RELATED ARTICLES AND EDITORIALS

a. William Bennett Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Court," 92 *Harvard Law Review* 610 (1978).
b. "Rights of the Helpless," editorial from the *San Francisco Chronicle*, February 22, 1979.
c. "Valuable Citizens," editorial from the *Detroit News*, March 3, 1979.
d. "Protecting the Rights of Citizens," editorial from the *Washington Post*, February 24, 1979.
e. "The Rights of the Forgotten," editorial from the *New York Times*, April 18, 1979.

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HARVARD LAW REVIEW

CONTENTS

WHEN PRISONERS SUE: A STUDY OF PRISONER SECTION 1983 SUITS IN THE FEDERAL COURTS

William Bennett Turner *

The rapid proliferation in recent years of suits by prisoners under 42 U.S.C. § 1983 has imposed a considerable burden on the federal judicial system. Courts have found that they are not always able to handle efficiently the emerging volume of litigation, much of it pro se and in forma pauperis, without risking derogation of meritorious claims. In this Article, Mr. Turner examines the causes of this increase in litigation and details the results of an empirical study of the ways in which some federal districts have approached this problem. He concludes with a series of recommendations of procedures the federal courts should adopt for processing prisoner section 1983 suits.

PRISONERS, like other people, may sue state and local officials under 42 U.S.C. § 1983,[1] to redress the deprivation of federal constitutional rights.[2] "[A] state prisoner who . . . mak[es] a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody" [3] may go to federal court to request injunctive and compensatory relief against abuses such as guard brutality,[4] inadequate medical care,[5] and racial discrimination.[6] Prison life creates the potential for an enormous number of cases under section 1983. As the Supreme Court has pointed out:

* Member of the California Bar. J.D., Harvard, 1963. This study was done under the auspices of the Harvard Law School Center for Criminal Justice. The author acknowledges the invaluable assistance of Holly Haugh, a third-year student at the Harvard Law School, in all phases of the study.

[1]

> Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

[2] *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972); Monroe v. Pape, 365 U.S. 167 (1961).

[3] Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) (citing Humphrey v. Cady, 405 U.S. 504, 516 n.18 (1972)).

[4] *See, e.g.*, Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Davidson v. Dixon, 386 F. Supp. 482 (D. Del. 1974).

[5] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974).

[6] *See, e.g.*, Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968).

> [f]or state prisoners, eating, sleeping, dressing, washing, working and playing are all done under the watchful eye of the State . . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.[7]

Every such dispute can become a section 1983 case.

Prisoner section 1983 suits proceed under the Federal Rules of Civil Procedure. Thus, in theory, prisoners may use such discovery techniques as interrogatories and depositions, and may maintain class actions against prison officials.[8] Hoping to obtain compensatory damages[9] and broad equitable relief resulting in systemic reform,[10] prisoners have made increasing use of section 1983 suits in recent years. Indeed, 9730 cases were filed in 1978, compared to only 218 in 1966, the year in which the federal courts first began to report this statistic.[11] This upsurge in volume is said to threaten both efficient judicial administration and the achievement of justice in individual cases, creating the possibility that judges will not be able to identify the meritorious cases in the flood of those deemed frivolous.[12]

To deal with the increased volume, most courts use a screening procedure unique to in forma pauperis proceedings.[13] This preliminary screening on the merits eliminates most prisoner section 1983 cases at the pleading stage, before process is even

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[7] Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

[8] FED. R. CIV. P. 23. Class actions are useful to avoid mootness if, as often happens, a named plaintiff is released from prison during the litigation. *Cf.* Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) (if class is properly certified, mootness as to named plaintiff not fatal to action). They also make appropriate wide-ranging discovery and injunctive relief. *See, e.g., In re* Estelle, 516 F.2d 480, 484 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976).

[9] *See, e.g.*, United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823 (3d Cir. 1976); United States *ex rel.* Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Wright v. McMann, 460 F.2d 126, 134–35 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Johnson v. Anderson, 420 F. Supp. 845 (D. Del. 1976).

[10] *See, e.g.*, Miller v. Carson, 563 F.2d 741, 752–53 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (case based upon the same alleged violations is still before the courts, *see* Hutto v. Finney, 98 S. Ct. 2565 (1978)).

[11] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR 207 (1975) (table 24) [hereinafter cited as 1975 ANNUAL REPORT]; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1978 ANNUAL REPORT OF THE DIRECTOR A–19 to –20 (1978) (table C–3) [hereinafter cited as 1978 ANNUAL REPORT].

[12] *See* Prisoner Civil Rights Committee, Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts 3, 5, 7–8 (tent. report Nov. 2, 1977) [hereinafter cited as Aldisert Report].

[13] *See* pp. 618–20 *infra*.

served on the defendant.[14] It also creates the most troublesome problem for the administration of justice in prisoner civil rights suits.[15] Many serious claims of mistreatment are doubtless lost in the sea of clumsy and prolix pro se pleadings, while legally meritless claims consume the time and erode the sympathy of court personnel.

This study examines the growth of prisoner civil rights suits, the treatment of these cases by the federal courts, the grievances alleged in section 1983 complaints, factors affecting the volume of prisoner litigation, and alternative methods for both courts and prisons to resolve prisoner grievances. It concludes with a proposal to reconcile the competing interests of efficient court administration and just disposition of individual cases.

Though habeas corpus proceedings can also be used to challenge certain conditions of confinement,[16] they are not included in this study. The primary function of habeas corpus is to challenge convictions or sentences.[17] Some prisoners do invoke habeas corpus to complain of prison conditions,[18] but its overall use has declined in recent years.[19] In contrast, the use of section 1983 to challenge prison conditions has steadily increased, and in fiscal year 1977 civil rights filings overtook habeas corpus filings.[20] Nor

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[14] *See* pp. 617–18 *infra*.

[15] *See* Aldisert Report, *supra* note 12, at 3, 5, 7–8.

[16] *See* Preiser v. Rodriguez, 411 U.S. 475 (1973); Wilwording v. Swenson, 404 U.S. 249 (1971); Johnson v. Avery, 393 U.S. 483 (1969).

[17] *See* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[18] *See* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 329–30 (1973) (23 of 257 habeas corpus cases filed during a three-year period in the District of Massachusetts complained of prison conditions).

[19] State prisoner filings peaked at 9063 in fiscal year 1970. 1975 ANNUAL REPORT, *supra* note 11, at 207, declining to 7033 in fiscal 1978. 1978 ANNUAL REPORT, *supra* note 11, at A–17 (table C–3).

[20] The § 1983 filings in the last five fiscal years were 5236, 6128, 6958, 7752, and 9730. 1978 ANNUAL REPORT, *supra* note 11, at 76. Without a separate study of individual habeas corpus cases such as that done in Shapiro, *supra* note 18, it is not possible to say how many habeas corpus cases challenged prison conditions as opposed to allegedly invalid convictions or sentences, and thus how many could more appropriately have been brought under § 1983. Assuming Professor Shapiro's figures are typical, the number is small.

The reasons for prisoner preference for § 1983 over habeas corpus are not hard to find. The habeas corpus statute requires the time-consuming and often futile exhaustion of state remedies, *see* 28 U.S.C. § 2254(b) (1976), while § 1983 plaintiffs who do not challenge the "very fact or duration of [their] physical imprisonment" or seek "immediate release or a speedier release" may go directly to federal court. *See* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). Further, § 1983 litigation makes possible the use of the discovery and class action provisions of the Federal Rules of Civil Procedure and can result in money damages and broad equitable relief. *See* p. 611 *supra*. These procedures and remedies are not generally available in habeas corpus actions.

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does this study expressly consider civil rights claims by federal prisoners, although much of the analysis is equally applicable.[21] Finally, the study does not consider prisoner litigation in state courts. It is possible that if the Supreme Court cut down on the opportunities for prisoner use of the federal courts,[22] there would be greater resort to state courts. This study, however, is limited to the federal district courts, the arena in which most of the action has taken place and the forum that has proved most sympathetic to prisoner litigants.

I. The National Picture: A Brief Survey of Prisoner Section 1983 Litigation

Prisoner section 1983 cases are spread unevenly among the ninety-five federal districts. The number in many districts fluctuates considerably from year to year. To determine the relative burden on the courts of prisoner civil rights suits in individual districts, we studied the filings in each district for the past five fiscal years.[23] In addition to examining the number of such suits filed we analyzed the number of cases per judgeship, the ratio of prisoner section 1983 cases to all civil cases, and the number of prisoner cases which actually go to trial.[24]

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[21] Some courts have required federal prisoners to exhaust administrative remedies before filing suit. *See, e.g.*, Paden v. United States, 430 F.2d 882 (5th Cir. 1970); O'Brien v. Blackwell, 421 F.2d 844 (5th Cir. 1970). *But see* Cravatt v. Thomas, 399 F. Supp. 956, 968–72 (W.D. Wis. 1975). In 1976, 28 U.S.C. § 1331 (1976), was amended to eliminate the $10,000 amount in controversy requirement In suits against federal officials. This gave federal prisoners the same kind of vehicle for judicial review of prison practices that § 1983 afforded to state prisoners. Interestingly, the amendment to § 1331, opening a clear jurisdictional route for federal prisoners, appears not to have encouraged new litigation. In fiscal year 1977, civil rights claims by federal prisoners declined from 502 to 483. *See* 1978 Annual Report, *supra* note 11, at 76. The claims rose moderately in fiscal 1978. *Id.* The 636 civil rights claims filed by federal prisoners in fiscal 1978 amounted to only 6.1% of the total prisoner civil rights suits filed that year. *Id.*

[22] *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (no right to form labor union; first amendment review constricted); Estelle v. Gamble, 429 U.S. 97 (1976) (medical malpractice by prison doctor does not violate constitutional rights of prisoner); Meachum v. Fano, 427 U.S. 215 (1976) (no due process hearing required for transfer to more restrictive prison, absent entitlement in state law).

[23] Unless otherwise stated, all references to years in this Article are to federal fiscal years.

[24] The figures summarizing § 1983 cases filed in the federal districts for the years 1976 through 1978 are in Appendix A, pp. 658–60 *infra*. In examining the number of prisoner civil rights suits filed per judgeship, we used the authorized judgeships listed for each district in Director of the Administrative Office of the United States Courts, Management Statistics for the United States Courts (1976). To determine the ratio of prisoner § 1983 cases to all civil cases in the districts, we

It is not surprising that, in general, there are more filings of prisoner civil rights suits in those districts in which there are major penal facilities. The national leaders in recent years have been the Middle District of Florida, whose Jacksonville Division includes the state's maximum security prison, and the Eastern District of Virginia, which includes the Virginia penitentiary and several smaller institutions.[25] At the other end of the spectrum are sparsely populated states such as North Dakota (two cases filed in 1978) and Alaska (five cases), and districts in more populous states that do not include major penal facilities.[26] Most of the districts that lead in the number of cases filed also lead in cases per judgeship, although there is considerable variation.[27] Wide swings in prisoner filings from year to year occur frequently. Increases exceeding one hundred percent are not uncommon, and large decreases have also occurred in some jurisdictions.[28]

There does not appear to be any strong relationship between the number of prisoner filings in a district and the ratio of those filings to all civil cases. The Eastern District of Virginia leads the nation in ratio of section 1983 cases to all civil filings, with

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used the data on civil filings available in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR (1977) [hereinafter cited as 1977 ANNUAL REPORT]. In examining the number of prisoner cases which went to trial, we utilized the data from a computer tape graciously made available by James A. McCafferty of the Administrative Office of the United States Courts [hereinafter cited as Computer Tape]. The tables containing the calculations and ranking of number of cases per judgeship, the ratio of prisoner § 1983 cases to all civil cases, and the number of cases which went to trial are on file with the author and with the *Harvard Law Review*.

[25] In 1978, Eastern District of Virginia filings overtook those in the Middle District of Florida, the leader in previous years. The Western District of Virginia was in third place, followed by the Northern District of Illinois, which includes the Stateville and Joliet maximum security facilities, and the Southern District of Texas, which includes 12 of the 15 prisons of the Texas system. *See* Appendix A, pp. 658–60 *infra*.

[26] *See id.* For example, the Southern District of California (San Diego area) and the Northern District of Iowa have very few prisoner civil rights cases, while other districts in the same states have substantial numbers.

[27] The Western District of Virginia had the highest number of prisoner § 1983 cases per judgeship (156) in 1977, followed by the Middle District of Florida (106), the Middle District of Louisiana (89 cases for only one judge), the Eastern District of Virginia (87), and Rhode Island (85 cases for each of two judges). The Western District of Wisconsin, a one-judge district, had led the nation in prior years but dropped to 10th place in 1977.

As a point of comparison, the large metropolitan districts naturally rank highest in civil cases filed, led by the Southern District of New York, the Northern District of Illinois, and the Central District of California (Los Angeles). There is very little correlation between the volume of all civil cases and the volume of prisoner civil rights cases. Of the top 10 districts in prisoner filings in 1977, only three were also among the top 10 in overall civil filings.

[28] *See* Appendix A, pp. 658–60 *infra*.

more than one-fourth of its civil caseload consisting of prisoner cases. Some of the large urban districts with high civil filings rank low in this respect, even though they have many prisoner cases.[29] In 1977, only four of the ten districts with the most prisoner filings ranked in the top ten districts in percentage of all civil filings.

There is surprisingly little correlation between prisoner filings and the number of cases going to trial. The Northern District of West Virginia led the nation in prisoner trials in 1975 and 1976.[30] The most experienced district in trying prisoner cases is the Southern District of Alabama, with a total of fifty-two cases tried in four years.[31] However, the five leading districts in filings, *combined*, had about the same number of trials in 1976 as the Northern District of West Virginia, eighteenth in filings, *alone*.[32]

Although the Southern States in 1976 had only 32% of the United States civilian population, they had 47% of the prison population.[33] These states accounted for 56% of prisoner section 1983 filings.[34] Florida and Virginia alone had 22.5% of all

[29] For example, in 1977 the Central District of California ranked 73d in the country with only 1.93% prisoner cases, and Massachusetts ranked 80th with 1.38%.

[30] There are several reasons for the large number of trials in the Northern District. Chief Judge Robert E. Maxwell attributes the volume of cases filed to the presence of both of the state's adult male prisons in the district and the activities of "several very prolific 'jailhouse lawyers.'" Letter to the author (Nov. 18, 1977). He believes that the Fourth Circuit case law "mandates the trial of many issues on mere suggestion in complaints, with only minimal factual allegations." *Id. See, e.g.*, Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), *cert. denied*, 99 S. Ct. 464 (1978). The Attorney General's office notes that the prisons have no grievance procedure, Letter from Assistant Attorney General John L. McCorckle (Dec. 1, 1977), a factor that forces prisoners into the courts.

[31] Chief Judge Virgil Pittman suggests that there may be a high number of § 1983 trials because the prison has no administrative grievance procedure and because the court does not dismiss cases "unless it conclusively appears that there is not a cause of action or there are no disputed facts." Letter to the author (Nov. 11, 1977). The Attorney General's office notes that the district found it "easier to try each case where there was the slightest possibility of a factual question," thereby avoiding reversal on appeal. Letter to the author from Assistant Attorney General Larry R. Newman (Nov. 28, 1977).

[32] The Middle District of Florida had 5 trials, the Eastern and Western Districts of West Virginia had 9 and 4, respectively, the Northern District of Illinois had 1, and the Southern District of Texas had 3.

[33] *See* National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, Prisoners in State and Federal Institutions on December 31, 1976 (advance report Mar. 1977) [hereinafter cited as Prison Population Report], which defines the South as including Delaware, Maryland, the District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, and Texas.

[34] ADMINISTRATIVE REPORT OF THE UNITED STATES COURTS, 1976 ANNUAL

the filings in 1978, and, with Texas, accounted for almost a third of the nation's filings.[35] The disproportionately large number of cases filed may reflect poor conditions or overcrowding. However, there is not a strikingly consistent relationship between rate of incarceration and amount of prisoner civil rights litigation. Thus, of the top ten states in prisoners per 100,000 population,[36] only five contain districts among the top ten in prisoner filings.[37]

II. A Closer Look at Prisoner Litigation: Five Individual Districts

To determine how prisoner cases are actually processed, the kinds of institutions they come from, what prisoners sue about, and the results obtained, we selected five federal districts for closer study. We examined the actual files of 664 cases in these districts,[38] tracing case progress from filing through disposition. The districts are the District of Massachusetts(D. Mass.), the Eastern District of Virginia (E.D. Va.), the District of Vermont (D. Vt.), the Northern District of California (N.D. Cal.), and the Eastern District of California (E.D. Cal.).

A. The Districts

Though D. Mass. is a very busy district, it has only an average number of prisoner cases. In 1977 it was seventh in the nation in civil filings and in 1976 it had the largest backlog of pending cases.[39] The District covers the entire state and thus receives prisoner cases from all state prisons and many local jails. No Massachusetts penal institution has a formal grievance mechanism

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Report of the Director 1–16 to –19 (1976) (table C-3) [hereinafter cited as 1976 Annual Report].

[35] 1978 Annual Report, *supra* note 11, at A-19 (table C-3).

[36] In order, North Carolina, Georgia, South Carolina, Florida, Maryland, Texas, Nevada, Louisiana, Alabama, and Michigan. *See* Prison Population Report, *supra* note 33.

[37] *See* Appendix A, pp. 658–60 *infra*.

[38] We compiled lists for each of the five districts of all prisoner civil rights cases filed and all such cases terminated in 1975, 1976, and the first half of 1977. In D. Mass. and D. Vt., we examined the file of every case in this 2½-year period; in N.D. Cal., all pending cases and a random sample (⅔) of the terminated cases; in E.D. Cal., a random sample (⅔) of all cases; and in E.D. Va., because of the very high numbers, a random sample (1/6) of the terminated cases and half of the pending cases (although in the Alexandria division we examined all pending cases). We examined 133 files in D. Mass., 187 in E.D. Va., 144 in N.D. Cal., 163 in E.D. Cal., and 37 in D. Vt. About 81% of the cases had been terminated at the time of examination; the rest were still pending.

[39] Director of the Administrative Office of the United States Courts, *supra* note 24, at 16.

except for an administrative appeal procedure instituted at Walpole, the state's maximum security prison, in 1976.[40]

The Eastern District of Virginia has the heaviest caseload of prisoner suits in the country. More than a fourth of its civil docket consists of prisoner cases. As is true of almost all states and of Southern States in particular, Virginia has seen a large and steadily increasing prison population in recent years.[41]

Vermont has a small prison population, with only 419 prisoners in 1976. The district of Vermont differed from the other jurisdictions studied in that prisoners have the benefit of in-prison counseling and representation by the state Defender General.

In 1976 California had the nation's largest prison population, with 21,088 prisoners,[42] but prisoner section 1983 filings there were not high. The Northern District ranked 45th in filings in 1977, after three years of steady and significant decrease in filings.[43] The Eastern District ranked 40th after two years of decrease.[44] The Northern District is a large metropolitan district while the Eastern District is a small, relatively rural one. The California prison system, with institutions in both districts, has a formal appeal system which was instituted statewide in 1974.[45]

B. How Prisoner Cases are Processed

The overwhelming majority of cases in the five districts were filed in forma pauperis, ranging from 84.7% in N.D. Cal. to 94.6% in D. Vt. Similarly, almost all the cases were filed pro se, except in D. Mass and D. Vt. where 15% and 21.6% respectively were filed by attorneys. No case in the E.D. Va. sample was prepared by an attorney.[46]

A high proportion of prisoner cases was disposed of at the pleading stage. In E.D. Cal. 80.4% of the cases in 1976 were terminated by the court without any response by the defend-

[40] Telephone interview with Carol Liebman, Corrections Department deputy counsel (June 9, 1977). We did not discern any impact on § 1983 filings because of the introduction of the procedure.

[41] *See* Prison Population Report, *supra* note 33.

[42] *Id.*

[43] *See* Appendix A, pp. 658–60 *infra*.

[44] The Central and Southern Districts ranked 66th and 84th, respectively, in 1978.

[45] California Department of Corrections, Memorandum to Deputy Director Nelson P. Kempsky (May 31, 1974).

[46] Despite the high proportion of pro se complaints, most of them were typewritten, legible, and relatively short. However, as one judge, known to be receptive to prisoner constitutional claims, has remarked, many of the complaints were "crude, opaque, verbose, exasperating, frequently disrespectful, sometimes trivial, and often without factual or legal merit." Memorandum from Judge James E. Doyle, W.D. Wis., to the Chief Justice of the United States and the Judicial Conference of the United States (Mar. 4, 1975).

ants.[47] Nationally, 68% of the prisoner cases were terminated at this early stage, and most of the remaining cases were terminated after issue was joined but before pretrial conference.[48] Very few cases went to trial. In 1976 no cases were tried in E.D. Cal. or D. Mass., only 1 case each was tried in N.D. Cal. and D. Vt., and 9 cases were tried in E.D. Va. Nationally, 268 or 4.2% of the prisoner cases went to trial.[49] The pattern was similar in prior years.[50]

Central to an understanding of why so many cases are disposed of without trial, and of prison litigation generally, is the nature of in forma pauperis processing. If a prisoner tenders the $15 filing fee, his complaint is routinely filed in the same manner as in any other civil case. It is of course subject to dismissal on motion by the defendant or for lack of prosecution, but there is no initial court scrutiny. If, however, the prisoner files in forma pauperis, his complaint is subject to a screening process used only for such cases. Screening practices vary from district to district. Practically nowhere are they published, embodied in a local rule or general order, or otherwise made known either to prisoner litigants or to the bar. Yet they are the most important feature of prisoner litigation.

The federal pauper's statute is 28 U.S.C. § 1915.[51] Subsection (a) provides that a court "may" authorize the commencement of a suit without prepayment of fees "by a person who makes affidavit that he is unable to pay." Subsection (d) provides that the court may dismiss the case "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."[52] As the Aldisert Committee — the Prisoner Civil Rights Committee of the Federal Judicial Center — has noted in its report, the practice now

[47] Seventy-seven and seven-tenths percent of the cases were terminated at this stage in N.D. Cal., 68% in D. Mass., 64% in E.D. Va., and 55.6% in D. Vt.

[48] Computer Tape, *supra* note 24.

[49] *Id.*

[50] E.D. Cal. had no prisoner trials in four years; there were 2 in D. Mass., 3 in D. Vt., 9 in N.D. Cal., and 42 in E.D. Va., in the same years. Nationally, less than one in 20 prisoner cases processed in the four fiscal years ending with 1976 went to trial. Computer Tape, *supra* note 24.

[51] 28 U.S.C. § 1915 (1976).

[52] Some courts have followed the unfortunate practice of reviewing the merits of the complaint before filing it, and denying leave to proceed in forma pauperis if the action is deemed frivolous or malicious. *See, e.g.*, Wartmen v. Wisconsin, 510 F.2d 130 (7th Cir. 1975); Wright v. Rhay, 310 F.2d 687 (9th Cir. 1962), *cert. denied*, 373 U.S. 918 (1963); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968). When this is done, the case does not even receive a docket number, and the procedure for appealing from the court's action is confused. Since the complaint is not even filed, it is not reported to the Administrative Office, so the number of prisoner cases actually presented to the federal courts is to this extent understated.

observed by most courts is "to consider only the petitioner's economic status in making the decision whether to grant leave to proceed in forma pauperis." [53] Indeed, the practice in many districts is simply to check for a pauper's affidavit in minimally acceptable form. After the complaint is filed, given a docket number, and assigned to a judge, it is screened pursuant to section 1915(d).[54] Although most districts give no further scrutiny to the plaintiff's economic status, all districts use the "frivolous or malicious" provision for sua sponte dismissal of an enormous number of prisoner cases.[55] It is this screening on the merits that presents the most difficult task faced by the courts in prisoner litigation. The goal, as the Aldisert Committee noted, is "to ensure that the meritorious complaint will not be overlooked" in dismissing the large number of cases deemed frivolous.[56]

While the screening process is not the same in all districts, in general someone reads the complaint, evaluates it in light of relevant law, and decides whether it has sufficient merit for the court to order service of process on the defendant. If service is made, the case proceeds more or less like ordinary civil litigation. If the complaint is deemed frivolous and dismissed, an appeal may be prosecuted by the prisoner, although the defendant may not learn of the case until it is in the court of appeals.[57] The problems arise in deciding who has the responsibility for reading and evaluating the complaint and what is the proper standard of sufficiency. The decisionmaking process is quite invisible.[58] Often there is little judge involvement. The indigent pro se prisoner

[53] *See* Aldisert Report, *supra* note 12, at 54. *See also* Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976).

[54] Interview with Duane Cheek, writ clerk, N.D. Cal. (July 12, 1977); Interview with Sheila Bassey, writ clerk, E.D. Cal. (July 25, 1977). In both California districts there is a general order directing the clerk, without any separate court order, to file the complaint without actual inquiry into the plaintiff's finances, provided that the affidavit is in proper form.

[55] Computer Tape, *supra* note 24.

[56] Aldisert Report, *supra* note 12, at 3, 5, 7–8. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 13 (1972) [hereinafter cited as FREUND REPORT], in discussing this problem, stated that "it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with."

[57] In Estelle v. Gamble, 429 U.S. 97 (1976), for example, the complaint and in forma pauperis application were tendered, the complaint was filed pursuant to 28 U.S.C. § 1915(a) (1976) and dismissed pursuant to *id.* § 1915(d), and the appeal followed. Since the complaint was dismissed sua sponte at the time it was filed, the defendants did not learn of it until the case surfaced in the Fifth Circuit. 429 U.S. at 98 n.2.

[58] *See* Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 160 (1972); *cf.* Shapiro, *supra* note 18, at 337 (habeas corpus petitions, especially when filed pro se, are at low visibility level).

who believes that he is sending his papers off to a judge for adjudication of the merits is probably misled.[59]

The districts studied generally use screening practices along these lines. In D. Mass. there are no local rules, prescribed forms, or written procedures governing the handling of prisoner cases. Upon receipt of a prisoner's papers, the clerk's office sends them to a United States magistrate for ruling on the in forma pauperis application, and the magistrate's review is directed to whether the prisoner is in fact indigent.[60] It is "very improbable" that the court would thereafter take any sua sponte action.[61]

The Eastern District of Virginia has three geographically separate divisions, making central screening somewhat unwieldy. Even within the divisions the judges use their own methods of dealing with prisoner cases. Until recently, the section 1915(d) screening was performed by a magistrate, law clerk, or judge, depending on the judge's preference. In 1977 a "writ clerk" took over these functions. The standards used by the clerk, directly out of law school and without guidance or training, are not clear.[62] The clerk drafts orders either dismissing the complaint pursuant to section 1915(d) or requiring a responsive pleading. The judges ordinarily sign the draft orders,[63] though some make dismissal conditional, giving the plaintiff an opportunity to cure defects.

The California districts studied have no local rules, general orders, or forms for section 1983 cases. Both districts have writ clerks who screen habeas corpus and section 1983 cases. In the Northern District, if a pauper's affidavit is tendered, the case is filed and a judge assigned.[64] After filing, the court clerk's office returns the complaint to the writ clerk for section 1915(d) screening.[65] The writ clerk's basic inquiry upon screening is whether there is enough substance to the complaint to warrant service on the defendant. If the clerk deems the complaint in-

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[59] *Cf.* FREUND REPORT, *supra* note 56, at 14 ("What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk.").

[60] Interview with David Copech, Deputy Clerk, D. Mass. (Apr. 6, 1977).

[61] *Id.* To the extent that there is no screening on the merits, the Massachusetts process adds many dubious cases to its already heavy backlog. There is no way of identifying meritorious cases for prompt attention.

[62] Two weeks into the job, the writ clerk was of the opinion that "most" of the prisoner cases are frivolous and there is "much lying." Interview with Joseph Vasapoli, writ clerk, E.D. Va. (June 14, 1977).

[63] *Id.*

[64] Interview with Duane Cheek, writ clerk, N.D. Cal. (July 12, 1977); Memorandum from Duane Cheek to Chief Judge Robert Peckham, N.D. Cal. (Jan. 6, 1977).

[65] Memorandum from Duane Cheek, writ clerk, to Chief Judge Robert Peckham, N.D. Cal. (Jan. 6, 1977). The papers do not go to the judge at this stage, even if a temporary restraining order or preliminary injunction is sought.

sufficient, a memorandum is sent to the judge recommending dismissal. The judges usually follow the clerk's recommendations. If they are not disposed to do so, they may send their law clerks to discuss the case with the writ clerk.[66] Once process is served the judges do not actively manage the cases, nor does the writ clerk have any further involvement.[67] A great many N.D. Cal. prisoner cases survive screening only to be dismissed for lack of prosecution.[68]

The screening process in the Eastern District is very similar.[69] Many cases are dismissed because, when the United States marshal writes the prisoner for "instructions" on service of process and threatens to collect fees for such service, the prisoner does not respond.[70]

In D. Vt., a two-judge district, law clerks do the initial screening. Forms are used and in forma pauperis treatment is "nearly automatic" if they are properly filled out.[71] Relatively few cases are dismissed sua sponte, probably because of the assistance of the Vermont Defender General's office. The defender general provides in-prison counseling and sometimes advises prisoners to use the institutional grievance system prior to filing suit.[72] This kind of screening results in "tighter" and doubtless fewer cases being filed.[73]

C. Nature and Results of Prisoner Litigation

In each district studied a high percentage of cases originated in maximum security prisons.[74] Except for Vermont, a not in-

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[66] *Id.* A distinguished N.D. Cal. judge, while remarking that "all judges are happy to terminate cases," noted that this weeding out procedure "improves the chances of those with meritorious complaints." Interview with Judge Alfonso J. Zirpoli (July 14, 1977).

[67] *Id.*; Interview with Duane Cheek, writ clerk, N.D. Cal. (July 12, 1977).

[68] Interview with Judge Alfonso J. Zirpoli, N.D. Cal. (July 14, 1977). This was confirmed by the file examination.

[69] Interview with Sheila Bassey, writ clerk, E.D. Cal. (July 25, 1977). The Eastern District clerk added that in forma pauperis screening is "a big headache since there are no guidelines."

[70] *Id.* Nationally, it is common practice for marshals to send form letters to indigent plaintiffs taking the position that § 1915 merely excuses "prepayment" of fees and demanding immediate payment of their "debt" to the government. This demand substantially undercuts the pauper's statute and confuses many prisoners. A demand for payment following upon the grant of an in forma pauperis application makes no sense. The marshal should at least await the disposition of the suit to see whether the plaintiff will in fact be liable for taxable costs. If the plaintiff prevails, he will never be liable for them.

[71] Interview with Edward Trudell, Clerk of the Court, D. Vt. (Aug. 17, 1977).

[72] Interview with Glenn Jarrett, Vermont Defender General's Office (Aug. 18, 1977).

[73] *Id.*

[74] Thus, 44.4% of the D. Mass. cases came from Walpole, 44.8% of the E.D.

significant percentage came from local jails as opposed to prisons.[75] In examining the files, we attempted to determine (1) the frequency with which various types of prisoner claims were made in each district, (2) the relief sought by the prisoners, (3) an indication of the burdens imposed on defendants and the courts, (4) the relief obtained in the suits, and (5) the effect of attorney involvement in the cases.

1. Nature of the Claims. — One of the major objectives of our study was to learn the kinds of grievances that provoke the filing of lawsuits. We defined thirty-two categories of claims. Those most frequently raised related to medical care, property loss or damage, and interference with "access to the courts."[76] In all the districts except Vermont, medical problems appeared in a fifth to a quarter of the complaints. Problems of access to the courts were particularly frequent in the California districts. Property claims were also consistently high. These types of claims, along with brutality, seem to be common in other districts as well.[77] On the other hand, some kinds of claims were surprisingly infrequent. For example, censorship of reading material was not a significant source of litigation in any of the districts. Claims of racial or ethnic discrimination exceeded five

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Cal. cases came from Folsom, and 59.7% of the N.D. Cal. cases came from San Quentin and Soledad.

[75] This percentage ranged to a high of 20.4% in Massachusetts. *See* Appendix B, pp. 660–63 *infra*. In N.D. Cal., 17.4% of the cases came from jails, while only 6.7% were jail cases in E.D. Cal. The difference between the California districts may be due to jail cases of some notoriety decided in the Northern District, *see, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), generating cases from other local jails. Interview with Judge Alfonso J. Zirpoli, N.D. Cal. (July 15, 1977); Interview with Chief Judge Robert F. Peckham, N.D. Cal. (Aug. 12, 1977).

[76] Access or "legal" complaints involved matters such as the adequacy of prison law libraries; access to legal advice or assistance (attorneys, law students, or fellow prisoners); censorship of mail or documents addressed to or received from lawyers, courts, or legal agencies; and punishment for "writ-writing" activity.

[77] The new writ clerk in the Southern District of Texas analyzed the grievances raised in the first one hundred cases he processed and found 16% medical cases, 10% property cases, and 6% "legal" cases; beatings and brutality (including police brutality) accounted for 9%. Letter from Craig M. Sturtevant to Judge Carl O. Bue, Jr., S.D. Tex. (Apr. 25, 1977).

The magistrate for the Middle District of Louisiana estimated that the four most frequently raised complaints were beatings or harassment by guards, denial of medical care, disciplinary punishment, and confiscation of property. Telephone interview with Magistrate Frank Polozola, M.D. La. (Dec. 7, 1977).

A study in the Northern District of Illinois found that eighth amendment claims of brutality, denial of medical care, and severe disciplinary punisbment were most frequent, followed by due process claims challenging discipline. *See* Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 Loy. Chi. L.J. 527, 536, 539 (1975).

percent of the cases only in N.D. Cal. Complaints about grooming restrictions, searches and shakedowns, religious problems, harassment by other prisoners (failure to protect), and sexual discrimination or harassment were uniformly insignificant.

In addition to these seldom-raised claims, others occurred with remarkable consistency among the districts, suggesting that it may be possible to generalize about the frequency of such claims nationally. Claims of guard brutality fell within a very narrow range, from a low of 7.5% to a high of 10.4% of all prisoner suits, with identical percentages for the two California districts. A somewhat related claim, harassment by guards, did not vary widely. Complaints about visitation problems were quite consistent. A few kinds of claims were very frequently raised in some districts but rare in others, suggesting that such claims are more responsive to special situations existing in a jurisdiction.[78]

A substantial number of cases — over a fifth of all filings everywhere except Vermont — did not relate to conditions of confinement at all. These claims involved parole denial or revocation, detainers, sentence computation, improper arrest or police misconduct, prosecutorial misconduct, erroneous conviction or unfair trial, and problems with court personnel. The existence of this sizable number of claims unrelated to conditions of confinement has two important implications: (1) many prisoner grievances cannot be resolved by any in-prison administrative mechanism, and (2) a large number of these cases raise issues at the "core" of habeas corpus, and cannot be brought in federal court without prior exhaustion of state judicial remedies.[79]

2. The Relief Sought. — While a high percentage of the cases sought injunctive relief of some kind, in three of the districts even more sought compensatory damages. In the California districts three-fourths of the complaints prayed for damages. A large number prayed for punitive damages.[80] Pretrial relief was also

[78] For example, mail censorship was frequently challenged only in California. Transfers dominated the D. Vt. filings because of a group of unusual out-of-state transfers, but appeared in only a handful of N.D. Cal. and E.D. Va. cases. Complaints about classification were raised in 23.3% of the D. Mass. cases (mostly complaints about being assigned to Walpole) but in only a few N.D. Cal. and E.D. Va. cases. Claims of generally poor living conditions appeared consistently in about 12% of the cases in D. Mass., E.D. Va., and N.D. Cal. but in only about 5% in E.D. Cal. Complaints about disciplinary procedures ranged from a high of 18.8% of the D. Mass. filings to only 3.7% in E.D. Va.

[79] *See* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[80] The aggregated amounts of damages claimed were extremely high, with more than 45% of all damage claims in all five districts exceeding $100,000. A not insignificant percentage of complaints failed to specify what relief they were seeking, and some prisoners ineptly prayed for a sentence reduction, criminal prosecution of the defendant, or a federal "investigation."

requested by some prisoners. In D. Mass. 28.6% of the cases prayed for a temporary restraining order (TRO). A large number of prisoners in all districts except E.D. Va. sought preliminary injunctions. Nearly all of this was, as discussed below, a futility.

3. Burdens on Defense and Courts. — In a high percentage of cases, ranging up to 69.3% in E.D. Cal., there was no appearance at all by or on behalf of the defendants.[81] Few prisoners attempted to conduct discovery, and still fewer successfully obtained any discovery. Hardly any of the cases went to trial. Only 18 of the 664 cases studied had either an evidentiary hearing or a trial. A grand total of forty-four court days over a two-and-one-half-year period were spent on the cases studied.[82] Almost half of the court days were in D. Mass.; only one was in E.D. Cal. Appeals were taken in a relatively small percentage of the cases.

4. Relief Obtained. — Permanent relief was practically never granted. In our 664-case sample, 3 injunctions were granted; minimal damages were awarded in 2 E.D. Va. cases but no others. Prisoners were somewhat more successful in obtaining pretrial relief than permanent relief. TRO's were obtained in 5 D. Mass. cases (out of 38 applications), 1 E.D. Cal. case (of 30 applications), and 1 D. Vt. case (of 8 applications). Preliminary injunctions were obtained in a total of 5 cases, out of 210 prayers for such relief.

5. Effect of Attorney Involvement. — As noted above, most of the cases were initiated pro se. In those few cases in which the prisoner was represented by counsel, this fact made a decisive difference. We considered the effect of attorney involvement on whether pretrial relief was obtained, discovery was successfully accomplished, and a trial or hearing was held and any permanent relief obtained.

The few TRO's granted were all obtained in cases that were prepared and filed by lawyers, except one in a case in which a lawyer appeared after the case had been filed. Of the preliminary injunctions granted, all were in cases prepared and filed by lawyers, except one in a case with appointed counsel.

In discovery, answers to interrogatories were obtained in only three pro se cases; requests for admissions were answered in only one such case. Pro se litigants failed to obtain production of any documents and did not take any depositions. A medical ex-

[81] In D. Vt., however, relatively few cases were dismissed sua sponte; the defendants entered appearances in 91.9% of the cases.

[82] We counted each day on which a hearing or trial was held, even though it is extremely unlikely that a full court day was in fact consumed.

amination was obtained in one D. Vt. case with an appointed attorney and in no other case.

Trials and evidentiary hearings were held only in cases with lawyers.[83] Of the two cases in which damages were awarded, a $200 award was obtained by appointed counsel and a six-dollar award was obtained by a pro se litigant without trial. Of the 3 cases in which permanent injunctions were obtained, 2 were filed by counsel and 1, in E.D. Cal., was pro se.

It is apparent that it is futile for prisoners to proceed pro se. Not only is it unlikely that their complaints will survive the ex parte section 1915(d) screening, but even assuming that the cases are not dismissed prior to service, they will languish on the courts' dockets. They are prime candidates for dismissal for failure to prosecute. Prisoners generally have neither the knowledge nor the resources to conduct discovery and move their cases to trial. Pro se litigation disserves both the interest in efficient judicial administration and the need to do justice in individual cases, as the suits crowd the court's calendar and require court action but rarely are adjudicated on the merits.

Since our study made no attempt to evaluate the merits of individual complaints and compare their disposition, it is not known whether justice was in fact done in individual cases.[84] It is possible that dismissal was justified in all the cases summarily disposed of. Yet there is no assurance that meritorious cases were sorted out from frivolous ones. There are many indications that cases were bureaucratically processed rather than adjudicated.

III. Factors Affecting the Volume of Prisoner Litigation

It seems useful, in evaluating the competing demands of judicial efficiency and the just disposition of individual cases, to consider why there are so many suits in some jurisdictions and what causes changes in the volume of litigation.[85] Many judges,

[83] In some cases we observed that counsel was appointed only after it was found that a trial or hearing was required. Appointment in those cases was an effect, not a cause, of a prisoner's day in court.

[84] For example, we do not know how many, if any, meritorious cases were wrongly dismissed. The E.D. Cal. Chief Judge, after seeing the results of this study for his district, stated that "[t]he study's simple recitation of the percentage of cases dismissed *sua sponte* does not necessarily reflect an accurate evaluation of the quality of justice dispensed by this court," Letter to the author from Chief Judge Thomas J. MacBride (Dec. 22, 1977).

[85] In examining changes in volume, we will not discuss changes in accounting and reporting by certain districts that made suspect some of the statistics on cases filed. For example, in 1976 the Southern District of Ohio reported a 109% increase in filings. According to the clerk of the court, this increase was largely due to a change in the court's method of processing prisoner suits. Instead of

clerks, and attorneys general we talked with had "no idea" that there were so many cases in their jurisdictions or why filings had gone abruptly up or down in a particular year. Several factors appear to have been important in encouraging or discouraging prisoner civil rights suits, although it is not possible to quantify their individual impacts.

A. Prison Population

The size of the prison population plainly bears some relation to the volume of prisoner lawsuits, both nationally and within a given jurisdiction, but it is by no means determinative. Nationally, the number of prisoners in state institutions has increased steadily in recent years; so has the number of prisoner suits. Indeed, in three recent years these increases were somewhat parallel.[86] But this pattern breaks down in earlier years. The most complete research on prison population reveals that it began to decline in

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denying leave to proceed in forma pauperis and never filing the complaints, *see* note 52 *supra*, the court began granting leave and then dismissing meritless complaints. Letter to the author from John D. Lyter, Clerk, S.D. Ohio (Nov. 8, 1977). Similarly, in 1977 the Eastern District of North Carolina reported a 62% increase in prisoner § 1983 suits after a 52% decrease in 1976. This was attributed to a 6- to 12-month delay by the United States Magistrate in ruling on in forma pauperis applications, thus postponing the filings from one year to the next. Letter to the author from Chief Judge John D. Larkins, Jr., E.D.N.C. (Nov. 26, 1977); Letter to Chief Judge Larkins from Special Deputy Attorney General Jacob I. Safron (Nov. 8, 1977). We also discovered some double-counting when cases were filed in the wrong district and then transferred to the proper district where they were counted again.

It is also worth noting that there is continuing confusion in the categorization of suits as habeas corpus and civil rights cases. Because § 1983 cases are a comparatively recent development, and because the judiciary was exposed first to habeas corpus, judges and court personnel frequently use habeas corpus vocabulary such as "petition," "writ," and "respondent" in describing any prisoner case. It is likely that when the pleadings are not clear and explicit, some cases that ought to be considered § 1983 actions are miscategorized as habeas corpus petitions and reported as such to the Administrative Office. We also found a substantial number of habeas corpus petitions which had been labeled and reported as § 1983 actions.

[86] From 1974 to 1976, the pattern was as follows:

	Total prisoners in state institutions		§ 1983 filings	
1976	254,961	(+11%)	6968	(+13.5%)
1975	229,685	(+17.1%)	6128	(+17%)
1974	196,105		5236	

The state population figures are from Prison Population Report, *supra* note 33, and National Criminal Justice Information Service, Law Enforcement Assistance Administration, Prisoners in State and Federal Institutions on December 31, 1975 (1977). The § 1983 filing figures are from 1976 ANNUAL REPORT, *supra* note 34, at 300–01, and 1975 ANNUAL REPORT, *supra* note 11, at 207.

1962 and by the end of 1968 had dropped 14.3% from the 1962 level.[87] It remained quite level for five years and then shot upward significantly every year since 1973.[88] In contrast, section 1983 prisoner filings have increased steadily since they were first counted in 1966.

Moreover, when individual states and districts are considered, the influence of population is seen to be less decisive. Though some states with large prison populations have many prisoner filings, the correlation between state prison populations and filings is not high. Many states with high prison populations have few filings. California, for example, had the nation's largest prison population in 1976,[89] but six other states had more prisoner filings. Ohio, 6th in prison population, ranked 13th in filings. Conversely, several states with lower prison populations had large numbers of filings. Virginia, 11th in prison population, was 3d in filings, and Pennsylvania, 12th in population, was 5th in filings. That influences other than population are present becomes clear when we consider the changes from year to year within a given district and from district to district within a given state. The many annual jumps in prisoner filings exceeding one hundred percent are not attributable to population increases. Nor do the decreases correspond with population declines, for there have been practically no declines in recent years.[90]

Though overcrowded prison conditions can be expected to produce some lawsuits,[91] there is no strong correlation between crowding beyond institutional capacity and volume of prisoner section 1983 suits. While there is as yet no agreement on how overcrowding should be measured, one way of looking at the problem is to consider the relationship between actual population and the rated capacity of the state's institutions.[92] As of the

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[87] 1 A. RUTHERFORD, PRISON POPULATION AND POLICY CHOICES 7 (1977).

[88] *Id.*

[89] *See* Prison Population Report, *supra* note 33.

[90] In California, there was a sharp drop in prison population from 1974 to 1975. It was the only state in the country to have a decline that year. Prisoner filings in the Northern District fell by over 39%. In the Eastern District, however, with the same prison system and population decline, filings increased by over 95% in the same year. No one whom we have asked has been able to suggest an explanation of the curious difference in filings between the Northern and Eastern Districts in 1974–1975.

[91] A close observer of North Carolina prisons believes that increased filings there are partly due to the combination of overcrowding and "highly publicized expressions of concern by prison administrators that it could result in a takeover of the prison system such as occurred in Alabama," Letter to the author from Professor Barry Nakell, University of North Carolina Law School (Nov. 29, 1977).

[92] *See* 1 A. RUTHERFORD, *supra* note 87, at 12, 105–06. The states, however, have different standards for measuring capacity. Some use figures based not on

end of 1977, only one of the states with the greatest deficits in capacity, Florida,[93] ranked in the top ten states in filings per prisoner, and it was tenth. Only three of the top ten districts in filings were in states with the greatest deficits in capacity.[94]

B. Prison Conditions and Rules

Prison conditions and rules undoubtedly affect the volume of prisoner litigation. As a general proposition, prisoners who live in spacious, clean facilities with good recreational or educational programs and few restrictive behavioral rules are less likely to file federal lawsuits than those who inhabit decrepit and unsanitary buildings, have no programs, and are subject to tyrannical guards and oppressive rules. Indeed, most prisoner civil rights suits challenge these conditions and rules. However, because there is no way to quantify the conditions of prison life, any conclusions about the effect of conditions and rules on the volume of litigation can only be impressionistic.

Despite this qualification, there do seem to be some jurisdictions in which conditions and rules have had a fairly direct impact on the filings of suits. The poor conditions in Florida and Virginia, the leading states in prisoner litigation, have been documented.[95] Similarly, the court decisions condemning barbaric conditions in other southern facilities provide a partial explanation for why these states, as a group, have a disproportionately large share of prisoner complaints.[96] The fact that most cases are filed by those confined to maximum security institutions also suggests that prison conditions and restrictive rules generate lawsuits.[97]

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physical measurement but on subjective judgments of prison management or the central corrections agency in the state. *See id.* at 105.

[93] *Id.* at 108.

[94] *See id.*; Appendix A, pp. 658–60 *infra*.

[95] *See* Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *vacated en banc on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[96] *See, e.g.*, Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (Louisiana); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (Mississippi); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *vacated en banc on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[97] A California official attributed a decline in prisoner filings to the closing of San Quentin's notorious "B Section," which he called an "abomination." Interview with Joseph Cavanaugh, California Dep't of Corrections (July 29, 1977). A Virginia assistant attorney general attributed part of the increase in Western District filings to the use of an inadequate facility as a maximum security prison. Telephone interview with Guy Horsely (Nov. 18, 1977). One judge stated un-

C. Substantive Law and Court Decisions

Without *Monroe v. Pape*[98] and the criminal procedure decisions of the Warren Court,[99] the dramatic increase in prison section 1983 suits would not have occurred. Those decisions made it possible for prisoners to sue state officials and to try to upset their convictions, and they encouraged prisoners and their jailhouse lawyers to take their constitutional arguments to federal court. Since the beginning of the prisoner rights movement, some decisions have had an encouraging effect, spawning new litigation, while others have clearly been discouraging. Without going into a detailed analysis of the development of correctional law in the last decade,[100] it is possible to point to decisions such as *Johnson v. Avery*,[101] *Haines v. Kerner*,[102] and *Bounds v. Smith* [103] as having opened the door to prisoner litigants. *Johnson* invalidated a ban on jailhouse lawyering and brushed aside arguments by state officials that this would threaten prison security. *Haines* made it clear that prisoner complaints are no more subject to summary dismissal than are those of nonprisoner litigants. *Bounds* held that states could not deny prisoners adequate law libraries or other legal assistance to prepare constitutional claims, and thus provided further encouragement to jailhouse lawyers. These decisions have increased prisoner litigation by making it easier for prisoners to file suit and requiring the courts to give serious consideration to their claims.[104]

On the other hand, some decisions seem to be a reaction to increased prisoner use of the courts, invoking a "floodgates" argument which emphasizes the need to conserve judicial resources and gives little weight to achieving just results in individual cases. The Supreme Court has in several decisions ban-

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equivocally that "deplorable facilities" and "management deficiencies" were responsible for the proliferation of lawsuits in his jurisdiction. Letter to the author from Chief Judge Raymond J. Pettine, D.R.I. (Oct. 31, 1977); *see* Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977).

[98] 365 U.S. 167 (1961).

[99] *See e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Fay v. Noia, 372 U.S. 391 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[100] For a recent and detailed discussion of the development of case law for prisoner § 1983 suits, see Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977); Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803 (1977).

[101] 393 U.S. 483 (1969).

[102] 404 U.S. 519 (1972).

[103] 430 U.S. 817 (1977).

[104] Letter to the author from Chief Judge John D. Larkins, Jr., E.D.N.C. (Oct. 29, 1977); Letter to the author from Professor Barry Nakell, University of North Carolina Law School (Nov. 29, 1977).

ished entire lines of constitutional development from the federal courts. In *Preiser v. Rodriguez*,[105] the Court held that prisoners could not use section 1983 to challenge the fact or duration of their confinement or seek immediate or speedier release. This holding disposed of all cases complaining of wrongful deprivation of good time, claims of arbitrary parole denial or revocation, and other claims having some relation to the amount of time served.[106] In *Baxter v. Palmigiano*,[107] the Court limited procedural due process in disciplinary cases by denying the rights to counsel and to cross-examination of witnesses in disciplinary hearings.[108] In *Meachum v. Fano* [109] the Court more generally restricted the development of procedural due process in corrections by ruling that the transfer of state prisoners to institutions with less favorable living conditions is not a deprivation of "liberty" requiring a hearing as long as "state law or practice" does not condition such a transfer on a finding of particular conduct. The fourteenth amendment was construed, in essence, to require a hearing to protect only those liberty and property interests whose source can be found in state law or in an independent constitutional provision. As a result of *Meachum* and its companion case, *Montanye v. Haymes*,[110] most section 1983 cases challenging transfers to more restrictive prisons, placement in maximum security facilities, arbitrary classification decisions, and denials or revocations of work or educational release may be summarily dismissed. *Meachum* and *Haymes* create the unfortunate paradox that the more a state circumscribes the discretion of its officials by statute or

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[105] 411 U.S. 475 (1973).

[106] The extent to which the logic of *Preiser* can be carried to bar § 1983 suits — forcing prisoners into state courts via habeas corpus — is indicated in Watson v. Briscoe, 554 F.2d 650 (5th Cir. 1977) (claim of erroneous determination of medical condition leading to good time loss and denial of parole cannot be brought under § 1983). *See also* Drollinger v. Milligan, 552 F.2d 2220 (7th Cir. 1977) (probationer cannot bring § 1983 suit to challenge condition of probation).

[107] 425 U.S. 308 (1976).

[108] In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court had held that certain other minimum due process safeguards must be observed before a prisoner can be deprived of good time for an infraction of prison rules. The Court tentatively rejected arguments for more stringent safeguards, noting that the procedures it had required were "a reasonable accommodation between the interests of the inmates and the needs of the institution," *id.* at 572. The Court expressed a willingness to reconsider the issues on a different record in the future, *id.*, but *Baxter* held that the "reasonable accommodation" test of *Wolff* was met, and no additional safeguards were necessary, even when the alleged rule infraction could also be prosecuted as a felony, 425 U.S. at 324.

[109] 427 U.S. 215 (1976).

[110] 427 U.S. 236 (1976) (transfers for misbehavior do not call for due process hearing absent entitlement rooted in state law).

regulation, the more the fourteenth amendment may be invoked to require procedural regularity. If the state, however, accords wide and unreviewable discretion to the officials, it may completely escape successful fourteenth amendment challenge.

Jones v. North Carolina Prisoners' Labor Union [111] emphatically ended attempts by prisoner unions to gain legal recognition.[112] The Court also used language that might be read more generally to constrict first amendment review in prisoner cases,[113] but it remains to be seen whether the Court will do so in a less threatening, nonunion context.[114]

Statutory developments affecting federal claims have been rare. Section 1983, its companion jurisdictional statute,[115] and the Federal Rules of Civil Procedure have not been materially altered in the last decade. As noted above, section 1331 of the Judicial Code [116] was amended in 1976 to remove the amount in controversy requirement in suits against federal agencies, thus giving federal prisoners a jurisdictional vehicle comparable to section 1983 as used by state prisoners. However, claims by federal prisoners then declined. The Civil Rights Attorneys Fees Awards Act of 1976 [117] may tend to promote prison litigation by authorizing fees for prevailing counsel in section 1983 actions.[118] But the statute should not significantly encourage filings by prisoners acting without counsel.

D. Receptivity of Individual Federal Judges

The "liberal" decisions and reputations of individual judges appear to encourage prisoner suits. Many prisoners ignore the fact that in multijudge districts there is no assurance that their

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[111] 433 U.S. 119 (1977).

[112] Some of these attempts are described in Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726 (1972). One purpose of prisoner organizations was to resolve grievances through bargaining as an alternative to litigation.

[113] 433 U.S. at 129–33.

[114] *See id.* at 147 (Marshall, J., dissenting) (expressing fear that Court's analysis might eventually strip prisoners of all constitutional rights).

The effect of Estelle v. Gamble, 429 U.S. 97 (1976), on prisoner filings is unclear. On the one hand, *Gamble* was the first case in which the Court actually applied the eighth amendment to prisoners' complaints about prison conditions. In so doing, however, the Court did not announce any principles not already being applied in the lower courts. Its holding that medical malpractice or negligence by prison doctors does not violate any constitutional right will no doubt take its toll of the frequent prisoner complaints of inadequate medical care.

[115] 28 U.S.C. § 1343 (1976).

[116] 28 *id.* § 1331; *see* note 21 *supra*.

[117] 42 U.S.C. § 1988 (1976).

[118] *See* Hutto v. Finney, 98 S. Ct. 2565 (1978) (fees may be awarded against officials, agency, or state, notwithstanding 11th amendment objections).

cases will come before a particular judge, and they address pleadings and letters to judges who have decided a famous case or otherwise indicated receptivity to constitutional claims. These judges act as magnets for prisoner cases. Some lawyers with considerable experience in handling prison litigation believe that the presence of a well-known liberal judge is the most important factor encouraging prisoner filings.[119] Individual decisions have also inspired second-generation — "me too" — complaints by prisoners in the same or a different institution.[120] One would expect, conversely, that inaction by the courts discourages prisoner filings, but the experience in Florida — with a paralyzed court [121] but ever increasing lawsuits — is to the contrary.

E. Change of Prison Administration or Policy

Just as prison conditions affect the volume of prisoner suits, so does the tone set by the prison administration. The tone may be reflected in restrictive or liberal rules, the manner in which prisoner grievances are dealt with, and the general responsiveness to prisoner concerns. The effect on filings becomes most noticeable when there is a change in administration. There seems to be a "wait and see" phenomenon, in which prisoners hold

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[119] Telephone interview with Alvin J. Bronstein, Director, National Prison Project (May 4, 1977); Telephone interview with Stanley A. Bass, NAACP Legal Defense and Educational Fund, Inc. (Apr. 22, 1977); Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977). The Chief Judge of the federal district court for the District of Maryland stated that there are "8:1 or 7:2 odds against the case being randomly assigned to such a judge," Letter to the author from Chief Judge Edward S. Northrup, (Nov. 14, 1977).

[120] For example, Judge Merhige's decision in Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), appears to have mobilized a large number of Virginia writ writers. Interview with Guy Horsely, Office of the Attorney General of Virginia (June 16, 1977). Similarly, Judge Zirpoli's decision in Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *aff'd*, 497 F.2d 809 (9th Cir. 1974), *rev'd sub nom.* Enomoto v. Clutchette, 425 U.S. 308 (1976), apparently led to the filing of many challenges to California disciplinary proceedings. These filings may have been ended by the Supreme Court's reversal. Interview with Judge Alphonso J. Zirpoli, N.D. Cal. (July 14, 1977); Interview with Duane Cheek, writ clerk, N.D. Cal. (July 12, 1977). Judge Zirpoli's decision condemning jail conditions, Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), apparently led to a second generation of county jail suits in the San Francisco Bay area. Interview with Chief Judge Robert F. Peckham, N.D. Cal. (Aug. 12, 1977); Interview with Judge Alphonso J. Zirpoli, N.D. Cal. (July 14, 1977). The pendency of a "big" case on prison conditions also generates similar complaints and related offers to testify. Letter to the author from Chief Judge David S. Porter, S.D. Ohio (Nov. 2, 1977); Letter to the author from Clarence W. Sharp, Assistant Attorney General of Maryland (Nov. 16, 1977).

[121] *See* note 142 *infra*.

off filing suit until it is learned what the new administration will do.[122] It may not matter whether the advance reputation of the new administration is of a "get tough" or "progressive" nature. What matters is that prisoners do not know whether existing modes of accommodation will be altered and whether rules and practices will survive. During the initial period of a new administration, filings are likely to decline. They will probably rise again unless the new administration brings with it means of resolving grievances short of litigation.

F. Availability of Administrative Remedy

The Aldisert Committee believes that the Federal Bureau of Prisons' grievance mechanism has caused a reduction in the number of suits by federal prisoners.[123] Although there was somewhat of a decrease in filings coinciding with the introduction of the mechanism, a causal connection between the two has not yet been established. While federal judges frequently express the hope that introduction of administrative remedies in state prisons would eliminate many section 1983 cases, the available evidence is unclear.

To be sure, there are some jurisdictions in which the complete absence of an in-prison mechanism compels prisoner reliance on the courts for dispute resolution. There is simply nowhere else to go.[124] However, no prison system has an adequate admin-

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[122] This may have been the cause of the precipitous drop in filings in Wisconsin in 1977. Both the Western and Eastern Districts experienced far fewer § 1983 filings, apparently because new prison administrators gave some indication of willingness to deal squarely with prisoner grievances. Telephone interview with Deputy Attorney General Maureen McGlynn (Oct. 27, 1977); Letter from inmate Ernie Bach to Deputy Attorney General James Petersen (Sept. 3, 1977) (inmate voluntarily dismissed five suits to honor new spirit of cooperation). The "wait and see" phenomenon has been observed elsewhere. Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977); Telephone interview with Michael Snedeker, Counsel for Prisoners' Union, San Francisco (July 13, 1977) (rules challenged in years of litigation changed "in seconds" after meeting with new director of corrections); Letter to the author from Professor Barry Nakell, University of North Carolina Law School (Nov. 29, 1977); Letter to the author from James C. Sargent, Jr., Assistant Attorney General of New Hampshire (Nov. 7, 1977).

[123] *See* Aldisert Report, *supra* note 12, at 19 n.30.

[124] For example, because Rhode Island had no grievance mechanism at all, prisoners had to rely on the federal district court as their forum for dispute resolution. *See* American Arbitration Association, Report and Recommendations Regarding the Development of an Inmate Dispute Resolution Procedure in Rhode Island (1977); Telephone conversation with Sandy Croll, Office of the Governor of Rhode Island (Nov. 15, 1977). Other jurisdictions with no mechanism or no trusted mechanism also find prisoners resorting to the federal courts as the only place where their claims have any chance of being heard. Letter to the

istrative grievance mechanism [125] that has been shown to reduce prisoner litigation.[126] In recent years a majority of systems have installed mechanisms such as ombudsmen, written appeal procedures, inmate councils, and "arbitration" models.[127] While, as discussed in Part V, the arbitration model seems to hold the greatest promise, it has not been widely implemented.[128] There is not yet any research showing that even a good model cuts down the number of lawsuits.[129] Indeed, it is possible that the introduction

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author from Judge Virgil Pittman, S.D. Ala. (Nov. 11, 1977); Letter to the author from John L. MacCorkle, Assistant Attorney General of West Virginia (Dec. 1, 1977).

[125] A report on the newly adopted New York grievance procedure found a "shortage of staff, a failure on the part of some to take the procedure seriously and appreciate its administrative and managerial benefits, and structural inadequacies." Association of the Bar of the City of New York, Special Committee on Penology, Basics Action Grant 15 (Dec. 8, 1976). In Virginia the in-house grievance system is accurately perceived by inmates as a mere formality. Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977).

[126] A recent General Accounting Office report studied the federal and state prison grievance procedures and found that the agencies lack "management information systems which they can use to assess how well their mechanisms are operating." Comptroller General of the United States, Managers Need Comprehensive Systems for Assessing Effectiveness and Operation of Inmate Grievance Mechanisms app. at 3 (Oct. 17, 1977). There were no records indicating the impact of the procedures on "legal actions." *Id.*

[127] *See generally* J. KEATING, V. MCARTHUR, M. LEWIS, M. SEBELIUS & L. SINGER, GRIEVANCE MECHANISMS IN CORRECTIONAL INSTITUTIONS 15–24 (1975) [hereinafter cited as GRIEVANCE MECHANISMS]; Committee on the Office of the Attorney General, National Association of Attorneys General, Prison Grievance Procedures (1974). The "arbitration" model involves institutional hearings including both line staff and inmates, with an appeal to higher authority and the possibility of participation by an independent outsider. Inmate councils and proposals for more formal bargaining are considered in Note, *supra* note 112, at 747–51.

[128] In 1977 the General Accounting Office surveyed all states and found that 43 states and 12 of the 20 largest cities had formal grievance mechanisms of some kind. Comptroller General of the United States, Grievance Mechanisms In State Correctional Institutions And Large-City Jails 3 (June 17, 1977). None of the systems fully met the accepted principles for an effective mechanism discussed p. 642 *infra*. Comptroller General of the United States, *supra*, at 4–6.

[129] A followup study of the implementation of the arbitration model in California Youth Authority (CYA) institutions shows that the mechanism worked well in resolving disputes. *See* D. MCGILLIS, J. MULLEN & L. STUDEN, CONTROLLED CONFRONTATION (1976). However, the study did not specifically consider whether CYA wards filed fewer lawsuits as a result. The General Accounting Office has found no data demonstrating a reduction in litigation in any system. *See* Comptroller General of the United States, *supra* note 126.

In North Carolina, the 1976 decrease in filings corresponded with the establishment of an Inmate Grievance Commission. The 1977 increase in filings apparently resulted from "disillusionment with the Commission because of its lack of authority and the fact that its recommendations were regularly rejected by

of a grievance mechanism could increase the number of suits by educating prisoners to make formal complaints, guiding them to articulate inchoate grievances and insist on their adjudication.[130] Even the best administrative remedy, moreover, cannot deal with the substantial number of prisoner complaints that do not relate to the conditions of confinement.[131]

G. Jailhouse Lawyer Activity

Every jurisdiction seems to have one or more notorious jailhouse lawyers,[132] who can account for as many as twenty or thirty cases filed in their own names. No one can be sure how many additional cases they may have drafted, advised, or inspired. The large number of cases in some jurisdictions that relate to "access to the courts" are likely to be connected with jailhouse lawyering. Though some decisions have prohibited punishment for "writwriting" and mandated expanded legal libraries, it is not clear that they have themselves increased litigation. It seems equally plausible that the more widespread knowledge of the law which these cases have promoted may reduce the number of marginal and frivolous claims.[133] It also seems likely that those jail-

the prison officials." Letter to the author from Professor Barry Nakell, University of North Carolina Law School (Nov. 29, 1977).

[130] *See* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113 (1976). Uncertainty about whether new grievance mechanisms will supply "a constructive outlet for suppressed anger" or "simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant)," *id.*, has been noted in Minnesota, Letter from Ombudsman Theartrice Williams to Professor Stanley Anderson (Sept. 3, 1976); Telephone interview with R. Halvorson, deputy ombudsman (Apr. 5, 1977), Virginia, Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977), and North Carolina, Letter to the author from Judge John D. Larkins, Jr., E.D.N.C. (Nov. 26, 1977).

[131] The implications for an exhaustion requirement are considered pp. 641–46 *infra*.

[132] Letter to the author from Chief Judge David S. Porter, S.D. Ohio (Nov. 2, 1977) (Ohio writ writers formed "Legal Paraprofessional Institute, Megalaw Division"); Letter to the author from Professor Barry Nakell, University of North Carolina Law School (Nov. 29, 1977) (prisoners' union newsletter circulated form complaint); Letter to the author from Clarence W. Sharp, Assistant Attorney General of Maryland (Nov. 16, 1977); Telephone interview with Craig Sturtevant, writ clerk, S.D. Tex. (Apr. 27, 1977) (some are called "multiple abusive filers"); Telephone Interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977); *see* Laaman v. Perrin, 435 F. Supp. 319 (D.N.H. 1977); Hill v. Estelle, 423 F. Supp. 690 (S.D. Tex. 1976); Carter v. Telectron, Inc., No. 71-H-944 (S.D. Tex. Dec. 3, 1976) (40 cases), *remanded*, 554 F.2d 1369 (5th Cir. 1977). *Cf.* Avichai, *Collateral Attacks on Convictions (1): The Probability and Intensity of Filing*, 1977 AM. B. FOUNDATION RESEARCH J. 319 (disproportionately large share of collateral attacks filed by small number of prisoners).

[133] *Cf.* Bluth, *Legal Services for Inmates: Coopting the Jailhouse Lawyer*, 1

house lawyers with predatory instincts prosper most when restrictions are tightest and underground assistance is the only kind available.

H. Availability of Legal Assistance

Very few prison systems provide legal assistance programs for prisoners. There is no evidence that providing counsel for prisoners encourages the filing of suits. Indeed, many believe that the availability of in-prison counseling reduces the volume of litigation.[134] It can do so in two ways. First, advice from lawyers that claims are without merit is likely to cut down the number of frivolous suits. Second, lawyers are likely to advise use of administrative channels prior to filing suit, because this avoids a later dispute over exhaustion of such remedies if suit is filed, assists investigation of the prisoner's claim, and provides some free discovery.[135] Thus it is possible that the prisoner's complaint may be resolved to his satisfaction by a grievance mechanism, making litigation unnecessary. To the extent that the availability of legal assistance promotes the in-prison handling of disputes, it cuts down the burden on the courts.[136] Moreover, cases that are filed with legal assistance are more likely to be meritorious, to pose the precise issue and relief sought, and to contribute to judicial efficiency by relieving the courts of their deciphering-screening burden.

CAP. U.L. REV. 59 (1972) (use of talented and supervised prisoners to assist legal services program may reduce number of frivolous suits).

[134] *See, e.g.*, Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 520–21 (1970); Aldisert Report, *supra* note 12, at 11; Telephone interview with William LaRowe, Director, State Bar of Texas Inmate Legal Services Project (Dec. 13, 1977); Letter from Warden Lou V. Brewer to Judge William Stuart, S.D. Iowa (Nov. 23, 1977) (filings appeared to decrease during attorney assistance program and increased again when funding ended); Letter to the author from Clarence W. Sharp, Assistant Attorney General of Maryland (Nov. 16, 1977) (increase in filings due in part to "the lack of 'screening' by any organized outside legal services organizations so that any letter of complaint almost automatically becomes a docketed case").

[135] Interview with Glenn Jarrett, Office of the Defender General of Vermont (Aug. 18, 1977); Interview with William LaRowe, Director, State Bar of Texas Inmate Legal Services Project (Dec. 13, 1977).

[136] *See* Aldisert Report, *supra* note 12, at 21–22. The state bar of Texas set up a legal services project to assist prisoners with civil rights claims, following the decision in Corpus v. Estelle, 409 F. Supp. 1090 (S.D. Tex. 1975), *aff'd*, 551 F.2d 68 (5th Cir. 1977). Since then most claims resolved by the lawyers have gone througb administrative channels, and few have been litigated. Interview with William LaRowe, Director, State Bar of Texas Inmate Legal Services Project (Dec. 13, 1977).

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1. Prison Riots or Disturbances

We found little evidence that riots, strikes and disturbances, or resulting lockdowns are significantly correlated with prisoner filings.[137] Leaders who are rounded up and segregated may file suits, but the judges whom we interviewed had not experienced upsurges of suits because of prison disorders. The buildup of unresolved grievances may in fact cause the disturbances.[138] If this is true, the airing of prisoner complaints both through administrative channels and in court would tend to defuse prison tensions and enhance the prisoners' perception that justice is being done.

IV. Impact on Courts and Prisons

A. Courts

The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate.[139] The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because court appearances and trials are rare, and because prisoner cases are not particularly complex as compared to other types of federal litigation.

On the other hand, pro se litigation is undoubtedly a problem for judicial administration. The burden on the court is mainly in screening such pro se cases, not in trying them. Relatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible. Thus, unlike other civil litigation, some court action is required on almost all the cases. The court action occurs in the initial section 1915(d) review, on a defendant's

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[137] One knowledgeable assistant attorney general in Virginia suggested that the shakedowns that accompany lockdowns sometimes produce suits complaining of property loss or confiscation. Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977). A Rhode Island judge noted new filings because of a lockdown. Letter to the author from Chief Judge Raymond J. Pettine, D.R.I. (Oct. 31, 1977).

[138] *See* M. Keating, Improved Grievance Procedures 28 (1976) ("Underlying most recent major prison riots . . . were festering, unanswered grievances. Rioting prisoners repeatedly lament that, under normal circumstances, no one will listen to their complaints or that, once heard, their grievances are ignored."). *See also* Note, *supra* note 112, at 755; New York State Special Comm'n on Attica, Attica: The Official Report (1972); Telephone interview with James Petersen, Deputy Attorney General of Wisconsin (Oct. 28, 1977).

[139] The Administrative Office categorizes the burden imposed by these cases as light. Director of the Administrative Office of the United States Courts, Management Statistics for the United States Courts 127 (1977).

motion to dismiss or for summary judgment, or on a periodic house cleaning when old cases are dismissed for lack of prosecution.

Of the five districts we studied, prisoner cases were considered by court personnel to be a serious burden only in E.D. Va., where the volume of such cases is exceedingly heavy, and in E.D. Cal. In other districts, the prisoner cases were at most a minor nuisance, not a real drain on the courts' resources.[140]

In the districts faced with an exceptionally high volume of prisoner suits, the ability of the courts to do justice in individual cases, or even to give them fair consideration, is plainly handicapped.[141] Other districts would be overloaded regardless of the prisoner cases.[142] However, innovative procedures have been experimented with and implemented in some pressed districts,[143] and it does seem possible both to achieve greater efficiency and to improve the chances of identifying and adjudicating meritorious cases.[144]

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[140] *See* Committee on Federal Courts of the Association of the Bar of the City of New York, *Recommendations for the Improvement of the Administration of* Pro Se *Civil Rights Litigation in the Federal District Courts in the Southern and Eastern Districts of New York*, 30 REC. A.B. CITY N.Y. 107, 109 (1975) (consensus among New York judges that the cases created no unusual burdens).

[141] In Maryland, a district with a consistently heavy caseload of prisoner cases, the chief judge believes that the burden is "devastating," and adds that as the backlog increases "daily, the chances of speedy disposition of a truly meritorious claim are diminished by the sheer weight of numbers." Letter to the author from Chief Judge Edward S. Northrup, D. Md. (Nov. 14, 1977).

[142] For example, in the Middle District of Florida, a leader in prisoner cases, there has been a breakdown in the administration of civil justice. The Jacksonville Division, which bears the brunt of Florida prisoner litigation, lacks a full-time judge. Because the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976), requires prompt trial of criminal cases, all available judicial time has to be devoted to them; no civil case can be tried. Prisoner civil rights cases piled up until there was, during 1976, a backlog of 1000 pending cases in which no action whatever had been taken. Telephone interview with Christopher Cloney, writ clerk, M.D. Fla. (Apr. 26, 1977); Letter from Mr. Cloney to Judge John H. Wood, Jr., W.D. Tex. (Mar. 18, 1977).

[143] *See* p. 648 *infra*.

[144] Assumptions that most of the cases are wholly without merit and that the courts are ill-equipped to handle pro se prisoner litigation are, to some extent, self-fulfilling prophesies. If those who must decide prisoner cases feel that they are a bothersome nuisance, most of the complaints will be read in a narrow, grudging manner; most of the cases will be dismissed as frivolous; and the task of deciding so many groundless claims will indeed seem burdensome. A detailed investigation of the disposition of prisoner habeas corpus cases in the District of Massachusetts showed great differences in "judicial sensitivity" to the cases. *See* Shapiro, *supra* note 18, at 337-39. The importance of individual judges' attitudes toward prison civil rights cases was emphasized in Bailey, *supra* note 77, at 547-49.

B. Prisons

The impact of prisoner litigation on prison systems is considerably greater than the statistics on court decrees would indicate. As noted above,[145] relatively few cases involve any discovery that would occupy the time of busy administrators. Still fewer cases go to trial and, of these, only a handful result in any relief. Though one might therefore think that prisoner cases have very little impact on the institutions, we found the contrary to be true. Nearly everyone we interviewed believed that the cases have had great impact. Many pointed out that even losing cases have resulted in reform.

Published research on the impact of judicial decisions on prisons has emphasized how concerned the officials are to avoid judicial intrusions into their domain.[146] Perhaps the most significant change in institutions as a result of prisoner litigation has not been greater funding for prison improvements or new facilities, or revised and liberalized rules, but rather the bureaucratization of the prison.[147] Where only a few years ago prisons operated without written rules and with only the most rudimentary recordkeeping systems, today prison authorities are engulfed in bureaucratic paper. There are regulations, guidelines, policy statements, and general orders; there are forms, files, and reports for virtually everything.

The bureaucratization process is in large part attributable to real or perceived demands for accountability by the courts.[148]

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[145] *See* pp. 624–25 *supra*.

[146] *See* M. Harris & D. Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings (ABA Commission on Correctional Facilities and Services 1976); Note, *Judicial Intervention in Corrections: The California Experience — An Empirical Study*, 20 U.C.L.A. L. Rev. 452 (1973); J. Jacobs, Stateville 105–23 (1977).

One judge said that prisoner litigation has had "a beneficial impact upon the practices of the prison officials. . . . Although a high percentage of the cases are meritless, the fact that they can be filed has caused the improvement of conditions within the prison." Letter to the author from Chief Judge William C. Stuart, S.D. Iowa (Dec. 13, 1977).

[147] *See* J. Jacobs, *supra* note 146, at 105, 136.

[148] Agreeing that prison litigation has had great impact in Virginia, an assistant attorney general volunteered that the main effect was "increased accountability." Telephone interview with Guy Horsely, Office of the Attorney General of Virginia (Nov. 18, 1977). He attributed the "reorganization" of the department of corrections to one lawsuit, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). A Wisconsin deputy attorney general also said that the officials were now more "accountable," kept better records, and issued more reasoned decisions. Telephone interview with James Petersen (Oct. 28, 1977). Several judges echoed the sentiments of Chief Judge Robert E. Maxwell, N.D. W. Va., that the officials are now "inclined to maintain a more professional, objective attitude than otherwise might be the case." Letter to the author from

If officials are to be able to defend themselves against charges of denying medical care, imposing solitary confinement without a hearing, or confiscating a prisoner's property, they need documentary proof of their version of the incident. Thus, in more or less direct response to prisoner litigation, prison systems have armed themselves with all the trappings of bureaucracy.

One can question whether anything of substance has changed. Bureaucratic forms can be filled out without changing substantive prison practices. Reports can simply document previously undocumented practices. The necessity to record events, however, makes it less likely that guards and officials will intrude arbitrarily into prisoners' interests. Bureaucracy may exacerbate the depersonalization of imprisonment, but at least it diminishes the likelihood of arbitrary abuse. One concrete result of some prisoner suits has been increased appropriations for corrections departments.[149] New facilities have been constructed to replace antiquated ones. It is unlikely that this would have occurred, given political realities, without federal court intervention.[150]

V. Recommendations

It seems possible to achieve a better reconciliation between the competing demands of efficient judicial administration and just disposition of individual cases. While the sheer volume of the cases impairs both interests — overloading certain courts and burying some meritorious cases — the solutions do not lie in legislation or Supreme Court decisions curtailing the right of prisoners to bring constitutional challenges in federal courts.[151]

Chief Judge Robert E. Maxwell, N.D. W. Va. (Nov. 18, 1977). A California deputy attorney general noted that "defensive" measures taken in response to prisoner lawsuits have resulted in changes even though the suits were ultimately lost by the prisoner. Interview with Nelson Kempsky (July 27, 1977). An Oklahoma assistant attorney general believes that "all correctional officers have improved their efficiency because of this [recordkeeping] requirement." Letter to the author from Paul Crowe (Nov. 21, 1977).

[149] M. Harris & D. Spiller, *supra* note 146, documents the implementation of decrees in four major conditions cases. All of them cost the government substantial sums of money, even though compliance was slow, grudging, and partial. The S.D. Ohio clerk of the court reported that "[d]ecisions of this Court have improved the conditions under which prisoners are housed. At one time, prisoners were kept in conditions that no self-respecting farmer would accept for his livestock." Letter to the author from John D. Lyter (Nov. 8, 1977).

[150] *Cf.* Laaman v. Perrin, 435 F. Supp. 319, 329 (D.N.H. 1977) (jailhouse lawyer "has achieved through litigation what the prison administration has failed to accomplish in the Legislature").

[151] Nor is it necessary to establish a new federal institution to handle prisoner cases, as recommended in Freund Report, *supra* note 56, at 47. The report's tentative recommendation was that a nonjudicial body should "investigate and

Rather, we view the basic problem as twofold: (1) reducing the number of frivolous cases and (2) improving the ability of the courts to identify the meritorious cases and fairly adjudicate them. Dealing with this problem requires action by the states,[152] Congress, and the courts.

A. Adequate In-Prison Administrative Remedies Should be Implemented, But Their Exhaustion Should Not Be a Jurisdictional Requirement

It is plainly desirable for prisons and jails to have meaningful grievance mechanisms regardless of whether they cut down the number of prison-related lawsuits.[153] Prison administrators themselves are coming to realize the benefits of such a procedure. It helps them to identify trouble spots and personnel problems; it minimizes disruptions by expeditiously dealing with internal problems internally; it gives them the opportunity to put their own house in order before having to defend themselves in court; and it is far more economical for the state than defending federal litigation.[154]

Further, in many instances what prisoners want most, when they complain about some prison rule or incident, is a speedy answer.[155] They want to know, for example, whether a guard has overstepped his bounds or whether the administration can lawfully enforce some rule or policy intimately affecting their

report on complaints of prisoners," with resort to the courts after a three-month period. *See id.* at 13–15, 47. We doubt that any centralized federal institution could adequately and expeditiously investigate individual complaints in local institutions, at least without a huge and costly new bureaucracy having perhaps hundreds of branch offices. We believe, as explained in this Part, that the focus should not be on ombudsmanlike investigation but rather on prevention of frivolous litigation in the first place and fair adjudication of the cases that are filed.

[152] Because they implicate so many state concerns other than reducing lawsuits, we put aside such obvious measures as markedly improving prison conditions and reducing prison populations.

[153] The new *Manual of Standards for Adult Correctional Institutions*, sponsored by the American Correctional Association, deems it "essential" for each institution to have a "written inmate grievance procedure which is made available to all inmates," AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS standard 4301 (1977).

[154] *See* M. KEATING, *supra* note 138; Comptroller General of the United States, *supra* note 128, at 1; Interview with Nelson Kempsky, Deputy Attorney General of California (July 27, 1977).

[155] Telephone Interview with Maureen McGlynn, Deputy Attorney General of Wisconsin (Oct. 27, 1977); Telephone Interview with Craig Sturtevant, writ clerk, S.D. Tex. (Apr. 27, 1977). *See also* Brief of Center for Correctional Justice as Amicus Curiae at 17–19, Burrell v. McCray, 426 U.S. 471 (1976) (for many inmates, opportunity to express grievances in a hearing is as important as whether they actually prevail).

daily lives. Protracted litigation does not meet this need. What is required is a quick answer from a responsible decisionmaker. This can be supplied by an administrative mechanism.[156]

The Center for Correctional Justice in Washington has pioneered in developing and implementing standards for prison administrative remedies. It has identified certain principles that any effective mechanism must have. They are (1) some form of independent review by persons outside the correctional structure; (2) participation by both line staff and inmates in the design and operation of the mechanism; (3) short, enforceable time limits; (4) written responses with reasons for adverse decisions; and (5) advance planning, leadership training, orientation, and evaluation of the mechanism.[157] There is now widespread agreement that these principles form the basis of an adequate administrative remedy.[158] This consensus should be translated into prompt implementation.

This does not mean, however, that a prisoner in a system with an adequate administrative mechanism in place should be compelled, as a jurisdictional matter, to plead its exhaustion before filing suit. An exhaustion requirement has been proposed by some judges[159] and by some in Congress.[160] The requirement

[156] Professor Sander suggests five criteria for determining the effectiveness of a dispute resolution mechanism: "cost, speed, accuracy, credibility (to the public and the parties), and workability." Sander, *supra* note 130, at 113 n.7. A good prison administrative mechanism is likely to be better than federal litigation in cost, speed, and workability; but existing mechanisms will have to improve their accuracy and especially their credibility in accordance with the principles discussed below in order to resolve substantial numbers of prison grievances effectively.

[157] GRIEVANCE MECHANISMS, *supra* note 127, at 33. These principles were first put into full operation in California Youtb Authority facilities. *See generally* D. MCGILLIS, CONTROLLED CONFRONTATION (1976). They have proved remarkably successful in resolving disputes that might easily have ripened into lawsuits. They are now generally recognized as preferable to other kinds of prison grievance mechanisms. *See* GRIEVANCE MECHANISMS, *supra* note 127, at 15–25 (examining ombudsman programs, grievance procedures, inmate councils, and labor model procedures).

[158] The principles have been substantially incorporated by the American Correctional Association into its manual of standards. *See* AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 153. They have also been adopted as minimum standards for prison grievance mechanisms in a bill reported out of the House Judiciary Committee, H.R. 9400, 95th Cong., 2d Sess. § 5(a) (1978), 124 CONG. REC. H7490 (daily ed. July 28, 1978), and by the American Bar Association In American Bar Association Joint Committee on the Legal Status of Prisoners, *Legal Standards of Prisoners*, 14 AM. CRIM. L. REV. 377, 578–82 (1977) (tent. draft).

[159] *See*, e.g., Secret v. Brierton, 584 F.2d 823, 828–31 (7th Cir. 1978); McCray v. Burrell, 516 F.2d 357, 375–77 (4th Cir. 1975) (Widener, J., concurring in part and dissenting in part), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976).

[160] *See* H.R. 5791, 95th Cong., 1st Sess. § 4, *Civil Rights for Institutionalized*

would doubtless reduce the number of suits filed. It would also improve judicial efficiency by narrowing the issues and, in some cases, providing a record of the administrative action in question. While it is a close question, we do not believe that a jurisdictional exhaustion requirement is appropriate.

In the first place, an in-prison mechanism simply cannot reach several kinds of prisoner complaints, amounting to a very substantial portion of the section 1983 cases filed. One group consists of cases not concerning conditions of confinement. As noted above,[161] many prisoner suits have nothing to do with the actions of prison officials, and the officials are powerless to remedy the problems. Falling within this category are suits challenging the prisoner's conviction or sentence, complaining of police or prosecutorial misconduct, or seeking relief against persons outside the prison.[162] It is true that the case law would excuse failure to exhaust if resort to a grievance procedure would plainly be futile.[163] But a jurisdictional exhaustion requirement would be a trap for the unwary. Prisoners' cases would be automatically dismissed upon initial screening unless the prisoners were sophisticated enough to allege sufficient facts to establish the futility of exhaustion. Given that most prisoner-plaintiffs are ignorant of technical legal rules and that almost all file pro se, the futility doctrine would not fairly solve the problem of the unavailability of administrative relief.

A substantial majority of prisoner cases seek money damages. However, few in-prison grievance mechanisms are authorized to grant such relief,[164] and it is improbable that more prison systems

Persons: Hearings Before the House Comm. on the Judiciary, 95th Cong., 1st Sess. 286 (1977) (denying relief to a prisoner in a § 1983 case "unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available," provided that such remedy is not "ineffective").

[161] *See* p. 623 *supra*.

[162] To the extent that some of these claims are barred under § 1983 by Preiser v. Rodriguez, 411 U.S. 475 (1973), the problem is one of screening, not exhaustion. The same is true of claims on which relief cannot be granted. For example, attempts to recover damages from legislators, judges, and prosecutors are barred by defenses of absolute immunity. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators). Section 1983 suits against private citizens fail because such defendants do not act "under color of state law." The underlying claims may be serious, but since relief under § 1983 is barred, the cases may be considered legally frivolous.

[163] *See, e.g.*, United States *ex rel.* Marrero v. Warden, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974); Cravalt v. Thomas, 399 F. Supp. 956, 970 (W.D. Wis. 1975).

[164] Some prison systems apparently permit prisoners to recover limited amounts for property loss or damage. For example, Wisconsin will pay up to $200 if the prisoner establishes that the loss is the state's fault. Telephone Interview with Maureen McGlynn, Deputy Attorney General of Wisconsin (Oct. 27,

will begin to offer it. Although prompt administrative resolution of the disputes would dispose of a large number of damage claims, some prisoners will continue to have damage claims that in-prison mechanisms simply cannot handle. There is some evidence that serious brutality claims cannot be resolved informally.[165] It would be pointless to require exhaustion in such cases.

Inmates in local jails are unlikely to be incarcerated long enough to permit exhaustion of administrative remedies.[166] An exhaustion requirement in these circumstances almost guarantees mootness. The solution for courts dealing with allegations of serious jail maladministration is not diversion of individual cases to administrative channels, but rather a class action under rule 23 of the Federal Rules of Civil Procedure. As noted above,[167] a class action permits the underlying issues to be resolved despite the release of the named plaintiff and makes systemic relief more appropriate. It also conserves judicial resources by resolving multiple claims in one proceeding.

When there is an emergency need for a temporary restraining order or a preliminary injunction, an in-prison procedure cannot provide it. For example, if a prisoner urgently needs surgery to prevent death or disability and alleges that it is being denied, remitting him to a bureaucratic grievance system would be irresponsible.[168]

1977). The California Department of Corrections will not pay property claims but will assist prisoners in filing claims through other channels. CALIFORNIA DEPARTMENT OF CORRECTIONS, ADMINISTRATIVE MANUAL § 7324 (1977). Apart from property claims, however, we have learned of no grievance mechanism making monetary relief available.

[165] An American Arbitration Association special report, while favoring a grievance system for Rhode Island, noted that no brutality case had been resolved through a similar mechanism. It recommended that such cases be left for court disposition. COMMUNITY DISPUTE SERVICE, AMERICAN ARBITRATION ASSOCIATION, REPORT AND RECOMMENDATIONS REGARDING THE DEVELOPMENT OF AN INMATE DISPUTE RESOLUTION PROCEDURE IN RHODE ISLAND 31–32 (1977). The California Department of Corrections recently paid $270,000 in a Soledad Prison shooting case that plainly could not have been resolved short of litigation. Interview with Joseph Cavanaugh, California Department of Corrections (July 29, 1977).

[166] Jails generally hold pretrial detainees who cannot make bail, persons convicted of misdemeanors, and sometimes persons convicted of felonies but serving short terms (usually less than a year). The average time served may be several days for pretrial detainees or as long as a month for convicted persons, but not long enough to process fully any formal claim for relief, either administrative or judicial.

[167] *See* p. 611 & note 8 *supra*.

[168] As pointed out pp. 620–21, 624 *supra*, the courts themselves have not been responsive to prisoner requests for emergency relief. A more efficient screening process, discussed pp. 648–52 *infra*, should improve the courts' ability to respond.

Finally, prison officials are of course powerless to declare a state statute or regulation governing their conduct unconstitutional. While in some instances they may have power to alter administrative regulations, it is unlikely that a duly considered regulation would be upset on a prisoner's complaint through an in-house grievance procedure. Moreover, the validity of statutes and regulations is the stuff of which constitutional adjudication is made.[169]

Thus, several large categories of prisoner suits cannot be reached by an administrative mechanism. Even in those cases which a good grievance mechanism could reach, an exhaustion requirement would not necessarily promote justice or conserve judicial resources. Though such a requirement would weed out, by attrition, many prisoner claims, there is no guarantee that the proportion of frivolous suits would be reduced. Further, each case would involve new issues — the availability and adequacy of the state remedies and whether the plaintiff's actions amount to exhaustion.[170] Forcing courts to resolve these issues before reaching the merits means that an exhaustion requirement may not, even if it reduces volume, be a net gain for judicial efficiency.

Nor is there any reason to single out prison litigants as uniquely subject to an exhaustion requirement. The Supreme Court has thus far resisted a special exhaustion requirement for prisoners.[171] No other class of citizens is required to resort to other channels before filing suit under section 1983, even when

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[169] When the case is filed in federal court, the doctrine of abstention might be invoked if interpretation of an unclear statute or regulation by a state court could avoid or substantially modify the federal constitutional question. *Cf.* Procunier v. Martinez, 416 U.S. 396, 404 (1974) (abstention not required where statute not reasonably susceptible to interpretation avoiding or modifying federal question).

[170] *See Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Elections of the House Comm. on House Administration*, 95th Cong., 1st Sess. 164–65 (1977) (testimony of Prof. Abram Chayes).

[171] *See* Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam) ("State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs."); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam); United States *ex rel.* Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). *But see* Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978) (exhaustion required for claim of deprivation of personal property of no great monetary value). The Center for Correctional Justice has argued that the imposition of an exhaustion requirement would be premature and might endanger the experimentation now going on with grievance mechanisms. Brief of the Center for Correctional Justice as Amicus Curiae at 6–10, Burrell v. McCray, 426 U.S. 471 (1976). The Court declined the opportunity to require exhaustion, dismissing the writ of certiorari as improvidently granted. 426 U.S. at 471.

the suit attacks the administration of important state institutions such as schools, police, and welfare systems.[172] Problems concerning the manner in which states deal with persons convicted of crimes are not intrinsically different or less important. Nevertheless, the sheer volume of prisoner litigation does justify authorizing the federal courts to use more limited means, short of a jurisdictional exhaustion requirement, to encourage in-prison resolution of grievances. The courts could be authorized to *stay* proceedings for a short time to permit administrative processing of the grievance underlying a lawsuit. This is substantially the proposal of a bill passed by the House of Representatives in the Ninety-fifth Congress.[173] Unlike a jurisdictional requirement that the prisoner plead and prove exhaustion of administrative remedies, the court, in deciding whether to stay a prisoner civil rights suit, could consider the nature of the complaint, whether resort to an in-prison procedure would likely yield meaningful results, and whether the state's procedures meet the recognized standards. Consideration of a stay should preferably be limited to cases in which the defendant requests it. This would be an indication that utilizing the prison mechanism might in fact be fruitful, and would minimize unnecessary factual determinations by the court.

B. In Forma Pauperis Requirements Should Not Be Made More Stringent

Since the overwhelming majority of prisoner cases are filed in forma pauperis, one sure way to reduce the volume is to tighten the requirements on indigent litigants. This does not, however, necessarily assure that the excluded suits will be the frivolous ones. There is no reason to believe that prisoners with meritorious claims will somehow find the financial wherewithal to file them.

It has been observed that, unlike most prospective litigants, indigent prisoners are not required to do any cost-benefit analysis before filing suit.[174] It is assumed that since filing is free, since the paper and postage are provided by the state, and since the

[172] *See* Damico v. California, 389 U.S. 416 (1967) (per curiam) (welfare requirements); McNeese v. Board of Educ., 373 U.S. 668 (1963) (school districts); Monroe v. Pape, 365 U.S. 167 (1961) (police misconduct). In all these cases, the Court rejected arguments that state remedies must be exhausted. *Cf.* Preiser v. Rodriguez, 411 U.S. 475, 492 n.10 (1973) (exhaustion required in cases within the "core" of habeas corpus because of specific habeas corpus statute, 28 U.S.C. § 2254(b) (1976)).

[173] H.R. 9400, 95th Cong. 2d Sess., 124 CONG. REC. H7490 (daily ed. July 28, 1978). The Bill also set minimum standards for prison grievance mechanisms.

[174] *See* Braden v. Estelle, 428 F. Supp. 595, 597 (S.D. Tex. 1977); Morales v. Schmidt, 340 F. Supp. 544, 547 (W.D. Wis. 1972), *remanded en banc*, 494 F.2d 85 (7th Cir. 1974).

prisoner has little to lose by going to court, many irresponsible suits are filed. Some certainly are. It is questionable, however, whether prisoner suits are cost-free. There are many well-documented instances of retaliation against prisoners who dare to sue their keepers, and the possibility of subtle reprisals is ever present.[175]

Tightening paupers' requirements seems impracticable. It is difficult to conceive of a mechanism that would force prisoners to engage in some form of cost-benefit analysis but would not work substantial injustice. At least one federal district has adopted a partial payment plan for section 1983 suits under which prisoners bear the costs of suit according to their ability to pay.[176] The early results, however, indicate that the plan is ineffective. Few prisoners have funds falling within the partial payment range; most have nothing or almost nothing.[177] Erecting more stringent financial barriers would ease the burdens on the judiciary by reducing caseloads, but at an unacceptably high cost to individual justice.[178] Money has little to do with merit. The federal courts should be open for constitutional adjudication regardless of the economic status of the plaintiff.

C. Procedures and Standards for Processing pro Se in Forma Pauperis Cases Should be Implemented, with Appointment of Counsel in Cases That Are Not Dismissed

The procedures and standards by which courts decide cases should not be secret. If prisoner cases are being processed and

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[175] *See, e.g.*, Ruiz v. Estelle, 550 F.2d 238, 239 (5th Cir. 1977) ("[As a result of] their participation in this litigation, these named Inmates have been subjected . . . to threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders to the contrary by the district court and our long-standing rule that the right of a prisoner to have access to the courts . . . shall not be abridged."); Haymes v. Montanye, 547 F.2d 188 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977); Hooks v. Kelley, 463 F.2d 1210 (5th Cir. 1972); Andrade v. Hauck, 452 F.2d 1071 (5th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972); United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964).

[176] The plan was adopted by the Southern District of Texas. Under it, prisoners with less than $20 in their prison accounts can file free; prisoners with more than $65 have to pay the full filing and service fees; a sliding and discretionary scale is applied to prisoners whose funds fall between these amounts. *See* Gen. Order No. 77-1 (S.D. Tex. Apr. 19, 1977).

[177] Telephone interview with Craig Sturtevant, writ clerk, S.D. Tex. (Nov. 14, 1977).

[178] More elaborate inquiry into the plaintiff's finances merely adds to the court's screening burden. The marshal's in terrorem warnings about "debts" to the United States, followed by vigorous collection efforts, *see* note 70 *supra*, are likely to be confusing to many prisoners and may deter the less sophisticated prisoners, but not necessarily those with the least meritorious claims.

disposed of by nonjudicial personnel, or even judges, the rules governing the method by which decisions are reached as well as the substantive grounds for decision should be public information. Each district with any significant number of prisoner cases should publish local rules spelling out precisely who does what and pursuant to what standards.[179] In districts with serious caseload problems, staff law clerks should be assigned to specialize in section 1983 and habeas corpus cases.[180] While districts already using such clerks have found them very helpful in expediting disposition of prisoner cases and contributing to increased uniformity of decisions,[181] the courts must be careful to preserve judicial responsibility for decisionmaking.

The focus of the procedures and standards promulgated by the districts should be the screening done under section 1915(d), as the fate of the prisoner's claim is likely to turn on the outcome of the initial screening. The court may dismiss a case filed in forma pauperis if it determines that the prisoner is not indigent or that the claim is frivolous or malicious.[182] To promote both the interests of justice and efficient judicial administration, we recommend the following standards and procedures for section

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[179] For example, if a recent law school graduate with no prior experience is the only person in the courthouse who actually reads prisoner pleadings, the procedures and standards used by this person should be made known to prospective litigants, the bar, and appellate courts.

[180] This was a recent proposal of the Administrative Office. Memorandum from Robert J. Pellicoro, Chief, Clerks Division, to Director William E. Foley (Nov. 25, 1977).

[181] *Id.* Districts involved in a Federal Judicial Center experimental clerk program were M.D. Fla., M.D. Pa., and W.D. Mo. The Administrative Office added D. Md., S.D. Tex., N.D. Ill., and E.D. Va. to the program. Other districts sponsored similar positions on their own.

One danger of reliance on such specialized personnel, however, is the isolation of the judges from the decisionmaking process and the consequent emphasis on efficient "processing" of cases rather than on adjudication. Indeed, the Administrative Office proposes "to substitute the use of attorneys for judges in screening [cases], thereby enabling the judges to devote more time to the bench," *id.*

The most highly developed set of staff clerk procedures we found is in the Southern District of Texas, where the staff has developed a comprehensive flowchart covering practically every event that can occur in prisoner litigation. Somewhat troubling is the flowchart's reduced role for judges, who are required only to sign orders prepared by other personnel; the only court proceedings they need preside over are cases in which the prisoner refuses to waive *jury* trial. Telephone interview with Craig Sturtevant, writ clerk, S.D. Tex. (Nov. 14, 1977). A more extreme version of judicial isolation occurred in the Middle District of Florida where, because of judge unavailability, see note 142 *supra*, the writ clerk spent his time trying to identify "dismissable" cases. Telephone interview with Christopher Cloney, writ clerk, M.D. Fla. (Apr. 26, 1977).

[182] *See* p. 618 *supra*.

1915(d) determinations and to govern those cases which are not dismissed.

1. Inquiry into Prisoner Finances. — Although section 1915(d) permits the court to attempt to ascertain whether "the allegation of poverty is untrue," no separate inquiry into prisoner finances should be made. It is wasteful for court personnel to make diligent efforts to determine whether a prisoner qualifies as a pauper. The local rules should provide that the complaint be "filed" if a pauper's affidavit is submitted in proper form.[183] The court can always decide the issue of the prisoner's indigence if the defendant, who can likely document the prisoner's financial status, raises it on motion, and appropriate sanctions, including prosecution for perjury, may be imposed if the prisoner has lied about his resources.

2. Determination of Whether Claim Is Frivolous or Malicious. — The legal standard for determining whether the claim is "frivolous or malicious" should be explicit. Neither judicial efficiency nor the cause of individual justice is served by leaving those who read complaints without clear guidance.[184] A prisoner case in which process has been served cannot be dismissed on motion of the defendant unless "it appears 'beyond doubt that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief.' "[185] The standard for sua sponte dismissal prior to service must be at least this generous. The court should simply ask whether the prisoner's claim, liberally construed,[186] is foreclosed by statute or controlling precedent. Such a standard would allow dismissal of cases brought against parties who are absolutely immune from suit (prison officials are not)[187] or entities that are not "persons" within the meaning

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[183] *See* Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976); p. 619 *supra*.

[184] *See* pp. 619–21 & note 69 *supra*.

[185] Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). *See also* Cruz v. Beto, 405 U.S. 319 (1972).

[186] Although Haines v. Kerner, 404 U.S. 519, 520 (1972), requires that pro se pleadings be given a liberal consruction, this rule is frequently disregarded. As mentioned in notes 62 & 144 *supra*, many of the court personnel who read, screen, and recommend rulings on prisoner complaints are quite cynical about the cases. It is not an exaggeration to say that they do not always give the benefit of the doubt to an unclear prisoner allegation.

[187] Prison officials enjoy only qualified immunity from damages. *See* Procunier v. Navarette, 434 U.S. 555 (1978). To invoke such immunity, an official must establish that (1) he or she could not reasonably have known that the action in question would violate the prisoner's rights and (2) the action was taken in good faith and not with an intention to interfere with the prisoner's rights or cause other injury. *Id.* at 561–62; *cf.* Wood v. Strickland, 420 U.S. 308, 322 (1975) (applying similar standards to school board members). *See also* Scheuer v. Rhodes, 416 U.S. 232 (1974).

of section 1983.[188] Other suits, barred by the case law, such as those alleging medical negligence,[189] seeking restoration of good time,[190] claiming a right to counsel in disciplinary hearings,[191] or objecting to an arbitrary transfer to a more restrictive institution,[192] could also be dismissed.

If the court determines under section 1915(d) that the complaint is defective, the court should give notice to the plaintiff of its intention to dismiss the case. The notice should be simply worded and state with sufficient particularity why the complaint is defective.[193] The notice should provide that the case will be dismissed unless the prisoner submits an amended complaint curing the defects. The court's notice might also appropriately include a request that the prisoner supply additional facts to clarify or support unclear allegations. An opportunity to cure defects promotes economy of judicial resources, as dismissal on a technicality may only produce a pointless appeal when the prisoner, prompted by notice, may be able to submit a valid claim. Predismissal notice also promotes fairness because prisoners may not realize, when they send their complaints to the court, that they will have no other chance to explain or be heard on the facts, or to submit any authorities that support their claim.[194]

3. Appointment of a Lawyer-Master to Investigate Cases Not Dismissed. — If the case is not found to be frivolous or malicious

[188] While states may not be persons for § 1983 purposes, municipalities are. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[189] Estelle v. Gamble, 429 U.S. 97, 105–07 (1976).

[190] Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

[191] Baxter v. Palmigiano, 425 U.S. 308, 315 (1976).

[192] Meachum v. Fano, 427 U.S. 215, 225 (1976).

[193] The need for an explanation is the same as in other contexts. *See* Wolff v. McDonnell, 418 U.S. 539, 564–65 (1974), where the Court held that procedural due process requires prison officials to furnish a written statement of the evidence relied upon and the reasons for a disciplinary action. This statement, the Court said, would avoid misunderstanding of the nature of the official's action, facilitate review, and assure fair treatment of the prisoner's case. *See also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (same requirement in parole revocation); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971) (reasons for denial of parole).

[194] An opportunity to cure defects also helps to prevent dismissal of valid claims because the person screening the complaint may not have done the exhaustive research that would yield a case in the plaintiff's favor. "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversarial presentation." Bounds v. Smith, 430 U.S. 817, 826 (1977). *See also* Lewis v. New York, 547 F.2d 4 (2d Cir. 1976). The opportunity to resist a summary dismissal is especially important where the district requires the use of forms explicitly warning prisoners not to cite any cases in their pleading. The Aldisert Committee form complaint, which is now in fairly widespread use, twice cautions prisoners not to cite authority. *See* Aldisert Report, *supra* note 12, at 82, 85.

under section 1915(d), the court should appoint an attorney to investigate the case, attempt to resolve it, and report to the court.[195] The appointed attorney's primary responsibility will be to the court, not the prisoner. Acting as a kind of special master, the lawyer's role should be to ascertain the parties' positions, investigate the facts through interviews and informal inquiries, and attempt resolution of the dispute. The order of appointment should direct the lawyer to report to the court within a stated period with a recommendation as to whether process should issue.[196]

The appointment of a lawyer-master will ease the burden of prisoner litigation on the court by clarifying and articulating the prisoner's grievances, fleshing out the facts on both sides, narrowing the issues, and quite possibly disposing of the controversy. A closer look by an attorney able to deal face-to-face with the parties, examine the records, and understand the full context of the case will also greatly enhance the likelihood of identifying meritorious cases and sorting out the insubstantial ones.

If the lawyer is able to resolve the case administratively or persuade the prisoner not to pursue the action, he should submit a proposed order dismissing the case. If the lawyer finds the case to be without merit, but the prisoner does not agree, the lawyer's report to the court (served on the prisoner) should state what has been done in the investigation of the case, what possible theories could be raised on behalf of the plaintiff, and why, under

[195] An amendment to the Criminal Justice Act, 18 U.S.C. § 3006A (1976), would be required to provide for compensation for appointed counsel. Section 3006A(g) authorizes discretionary appointment and compensation of counsel in habeas corpus cases but not in § 1983 cases. 28 U.S.C. § 1915(d) states that the court may "request" an attorney to represent a party who proceeds in forma pauperis, but there is no provision for compensation.

Judges are reluctant to appoint counsel to act in prisoner cases when the lawyers will not be compensated. Uncompensated counsel are not likely to devote the time and effort needed for thorough investigation. Interview with Judge Alfonso J. Zirpoli, N.D. Cal. (July 14, 1977); Interview with Chief Judge Robert F. Peckham, N.D. Cal. (Aug. 12, 1977); Letter to the author from Chief Judge Thomas J. MacBride, E.D. Cal. (Dec. 22, 1977) ("The lack of assured compensation is the primary factor inhibiting the appointment of counsel."); Letter to the author from Chief Judge Edward S. Northrup, D. Md. (Nov. 14, 1977) ("Although there are now provisions for award of attorney's fees to successful § 1983 litigants, attorneys are generally unwilling to take such cases in view of the unlikelihood of prevailing on the merits."); B. Crabb, Trial of Prisoner-Pro Se Cases (unpublished paper Sept. 19, 1977).

[196] The lawyer appointed should preferably be associated with an organization, such as a legal services office, that is in the business of providing legal assistance for prisoners. As Judge Robert B. Merhige, Jr., E.D. Va., noted, "It takes a special person to handle these cases." Interview (June 21, 1977). The need is for someone with ready access to the institutions, background in corrections law, and enough experience in dealing with prisoners and prisons to

controlling law, the plaintiff cannot prevail.[197] If the court is persuaded by such a report that the lawyer has adequately investigated the case and that the prisoner's case is without merit, the case should be dismissed.

4. Appointment of Counsel in Cases Which Cannot Be Resolved. — If the attorney reports that the prisoner's claim has merit and cannot be resolved, process should be issued.[198] The court should at the same time appoint a different attorney to represent the plaintiff in the action. This lawyer will have a different function — to act in the traditional role of counsel for the plaintiff.

Provision of counsel primarily serves the interest in achieving justice in meritorious cases. As noted above,[199] it is futile for prisoners to proceed pro se. Only representation by counsel will ensure the clear and effective presentation of the prisoner's claim from pleading through discovery to disposition. Provision of counsel will also contribute to more efficient court administration as court personnel will be spared the time-consuming tasks of deciphering prisoner communications, dealing with inappropriate pro se motions or other demands, and managing the cases.[200]

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unravel what happened and expeditiously seek an appropriate remedy. In many cases the remedy will be found through administrative channels. *See* p. 636 *supra*.

[197] *Cf.* Anders v. California, 386 U.S. 738, 744 (1967) (similar report required to justify withdrawal of appointed counsel on criminal appeal).

[198] The court should order the marshal to serve the defendant without prepayment of fees and without making a demand for payment prior to disposition of the suit. *See* note 70 *supra*.

[199] *See* p. 625 *supra*. The Aldisert Committee lamented the absence of a statutory basis for compensating appointed counsel and said that "[n]ot appointing counsel in some cases results in a situation where a pro se plaintiff, who may have a meritorious case, is unable adequately to represent himself." Aldisert Report, *supra* note 12, at 62. *See also* Zeigler & Hermann, *supra* note 58, at 211–12.

[200] Though there will be savings through increased efficiency, providing counsel will not be without cost. The Criminal Justice Act, 18 U.S.C. § 3006A (1976), will have to be amended to provide for compensation of counsel and reimbursement for litigation expenses. *See* note 195 *supra*; Ziegler & Hermann, *supra* note 58, at 215; Committee on the Federal Courts, *supra* note 140, at 111 (recommending appointment and compensation as a matter of course).

If the case goes forward and the plaintiff prevails with appointed counsel, the lawyer should be required to file a motion for fees under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Such fees, fully compensating the lawyer for the time and expenses invested in the case, would be paid by the defendant (or the state agency or state). *See* Hutto v. Finney, 98 S. Ct. 2565, 2575 (1978) (fees may be collected from official or from state or local government, whether or not they were named parties). Counsel would then be required to forego Criminal Justice Act compensation from the United States. The federal government would thus be required to pay fees and expenses of counsel only in cases that are dismissed or in which the plaintiff is

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Further, when there is counsel, stipulations and settlements become possible.[201]

The careful procedures proposed above are needed because every prisoner section 1983 case necessarily involves constitutional adjudication. In each case, "to refrain is to decide" a constitutional question.[202] Yet "the necessity that the cases be decided forbids despair." [203]

D. The Attorney General Should Engage in "Pattern or Practice" Litigation in Cases of Widespread Denial of Constitutional Rights

The Congress has been considering legislation that would give the Attorney General statutory authority to initiate litigation where there exists a "pattern or practice" of denying constitutional rights to incarcerated citizens.[204] Although the Justice Department has in fact been involved in several important prison suits,[205] there is no explicit statutory authority for action by the department, and at least two courts have denied the Attorney General

otherwise unsuccessful. As in other Criminal Justice Act representation, the lawyer will in those cases have rendered a valuable public service.

[201] Judicial efficiency can also be promoted by using innovative techniques adopted in several districts. For example, groups of cases can be handled in court-supervised settlement conferences. In Rhode Island, the court disposed of 103 pending cases when it referred 135 cases to an unusual grievance committee composed of a magistrate, corrections officials, corrections counsel, a public defender, and inmate representatives. Letter to the author from Chief Judge Raymond J. Pettine, D.R.I. (Oct. 31, 1977). If settlement is not achieved, United States magistrates can be utilized to supervise discovery, hold pretrial conferences, and conduct some evidentiary hearings. *See* Aldisert Report, *supra* note 12, at 65, 76–81.

[202] Morales v. Schmidt, 340 F. Supp. 544, 554 (W.D. Wis. 1972) (Doyle, J.), *remanded en banc*, 494 F.2d 85 (7th Cir. 1974).

[203] Morales v. Schmidt, 340 F. Supp. 544, 548 (W.D. Wis. 1972), *remanded en banc*, 494 F.2d 85 (7th Cir. 1974).

[204] The Senate bill, S. 1393, 95th Cong., 2d Sess. (1978), was reported out by the Committee on the Judiciary in July 1978. S. REP. No. 95-1056, 95th Cong. 2d Sess. (1978), 124 CONG. REC. S12156 (daily ed. July 31, 1978). The House counterpart, H.R. 9400, 95th Cong., 2d Sess. (1978), was reported out by its Committee on the Judiciary in April 1978. H.R. REP. No. 95-1058, 95th Cong., 2d Sess. (1978). The House bill passed, with certain limiting amendments, 124 Cong. Rec. H7490 (daily ed. July 28, 1978). The 95th Congress adjourned without action by the Senate.

Both the House and Senate Committees reported that "[t]he proliferation of Federal law and constitutional doctrine guaranteeing certain basic rights to institutionalized persons has done nothing to overcome their inherent inability to secure enforcement of those rights," and that institutionalized people are "uniquely unable" to protect their rights "without outside assistance," H.R. REP. No. 95-1058, at 17; S. REP. No. 95-1056, at 17.

[205] *See* S. REP. No. 95-1056, 95th Cong., 2d Sess. 7–9 (1978). The Senate Committee recognized that "[c]orrectional and pretrial detention facilities have improved markedly as a result of suits brought or assisted by the Justice Department," *id.* at 12.

standing to sue.[206] Clarifying legislation authorizing the Justice Department to rectify widespread constitutional deprivations should promptly be enacted.[207]

Action by the Attorney General would both promote efficient court administration and help assure full and fair adjudication of claims of systemic abuse. Judicial resources can be conserved by consolidating numbers of individual cases into a single proceeding that addresses systemwide abuse. Justice Department participation imparts credibility to the proceedings, alerting the courts to the seriousness and pervasive nature of the violations alleged.[208] Further, private litigants, even with court-appointed

[206] United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) (Maryland institution for mentally retarded); United States v. Mattson, No. 74-438 (D. Mont. Sept. 28, 1976), *appeal docketed*, No. 76-3568 (9th Cir. Dec. 3, 1976) (Montana institution for mentally retarded). *But see In re* Estelle, 516 F.2d 480 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976) (mandamus does not lie to challenge intervention by Attorney General in prisoner suit).

[207] The Senate and House bills introduced for this purpose in the 95th Congress were not identical. The Senate Judiciary Committee accepted a compromise amendment limiting Attorney General suits (but not interventions in suits brought by others) to cases involving "extraordinary or flagrant conditions (conditions which are willful or wanton or conditions of gross neglect)" that subject prisoners to "grievous harm." The committee report, however, stated that this was merely "intended to parallel the limitations that have been applied to actions brought under 42 U.S.C. § 1983," S. REP. No. 95-1056, 95th Cong., 2d Sess. 27 (1978). While some courts might attach little meaning to the "flagrant" language, a straightforward authorization to remedy a "pattern or practice" of constitutional deprivations, as provided by the House bill and other civil rights statutes, *e.g.*, Title VI of the Civil Rights Acts of 1960, 42 U.S.C. § 1971(c) (1976) (voting rights); Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) (1976) (education); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (1976) (employment discrimination); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3613 (1976) (housing), would eliminate unnecessary confusion.

Alternatively, the standards for filing suits used in practice by the assistant attorney general could be written into the statute. They are that (1) a "significant number" of individuals are being deprived of federal rights; (2) the deprivations are pursuant to broadly applicable policies or practices; (3) they "are of an extremely serious nature"; and (4) there is "no realistic prospect of an effective, timely remedy without the involvement of the United States," S. REP. No. 95-1056, 95th Cong., 2d Sess. 32 (1978). Letter from Drew S. Days III, Assistant Attorney General, Civil Rights Division, to Senator Birch Bayh (July 28, 1977).

Another major difference between the House and Senate bills was the inclusion of provisions in H.R. 9400, 95th Cong., 2d Sess. (1978), 124 CONG. REC. H7490 (daily ed. July 28, 1978), requiring the Attorney General to promulgate minimum standards for prison grievance mechanisms and authorizing courts in § 1983 suits to stay proceedings for up to 90 days for exhaustion of acceptable grievance remedies. *See* note 158 & p. 646 *supra*. Both bills appropriately comprehended, in addition to jails and prisons, institutions confining the mentally ill or retarded, the handicapped, and juveniles.

[208] S. REP. No. 95-1056, 95th Cong., 2d Sess. 20-21 (1978); H.R. REP. No. 95-1058, 95th Cong., 2d Sess. 20-21 (1978).

counsel, usually will be unable to marshal the resources needed to mount a comprehensive attack on institutional abuses.[209] Once classwide relief is secured, the Justice Department has the "staying power" to ensure that the court's decree will be implemented and enforced.[210]

It has been estimated that seven to ten suits per year could be filed under the "pattern or practice" authority without having a significant impact on the Justice Department budget.[211] Targeting these suits at the federal districts laboring under heavy caseloads of prisoner cases would both relieve the courts of the burden of processing hundreds of individual claims and ensure that serious prison issues are in fact addressed. Relief, rather than being scattered and responsive only to individual situations, would be directed to those prison abuses which provoke large numbers of prisoners to file suit.

Although suits by the Attorney General would appear to be the ideal solution to prisoner litigation in heavy volume districts, they are not a complete answer to the problems posed by prisoner section 1983 cases. The Justice Department cannot and should not be everywhere. There will always be instances of serious individual mistreatment that do not fall within a "pattern or practice." But authorizing the Attorney General to investigate and act upon complaints of institutional abuse, even if the authority is not frequently invoked, should induce prison systems throughout the country to put their houses in order, thus mooting the complaints of individual claimants and altering some of the conditions that inspire lawsuits.

B. Programs of In-Prison Legal Assistance Should Be Developed

The states should develop legal assistance programs to provide in-prison counseling and court representation in civil rights and habeas corpus cases.[212] Such programs would discourage the

[209] S. REP. No. 95-1056, 95th Cong., 2d Sess. 17-18 (1978); H.R. REP. No. 95-1058, 95th Cong., 2d Sess. 17-18 (1978).

[210] S. REP. No. 95-1056, 95th Cong., 2d Sess. 21 (1978); H.R. REP. No. 95-1058, 95th Cong., 2d Sess. 21 (1978).

[211] S. REP. No. 95-1056, 95th Cong., 2d Sess. 31 (1978); H.R. REP. No. 95-1058, 95th Cong., 2d Sess. 31 (1978).

[212] A number of prison legal assistance programs exist and seem to be working well. For example, the Vermont Defender General provides comprehensive prisoner counseling and representation. Interview with Glenn Jarrett (Aug. 18, 1977). There is a similar, well-established program in Kansas, Legal Services for Prisoners, Inc. The largest program is in New York, where Prisoners' Legal Services of New York, with initial LEAA funding, employed up to 35 lawyers in seven offices to serve the state's prison population. Prisoners' Legal Services of New York, Program Description (Feb. 1978). In Texas, the Department of Corrections itself operates a program of assistance in habeas corpus and other civil

filing of frivolous claims and promote the administrative resolution of prisoner grievances,[213] thereby reducing the volume of prisoner litigation.[214]

Nor would these programs be prohibitively expensive. It has been estimated that a comprehensive program, reaching all prisoners and dealing with all kinds of legal problems, would cost seventy-five dollars a year per prisoner. Since the average cost for care and custody of an adult prisoner in 1975 was $7041, a complete legal services program would raise that cost by only 1.1%.[215]

Prison legal services programs also offer a promising method for complying with recent cases requiring effective prisoner access to the legal system. Under *Bounds v. Smith*, the states have an obligation to provide "meaningful" access to the courts for prisoners, through law libraries or "adequate assistance from persons trained in the law."[216] This access can be supplied by the proposed legal assistance programs, probably at a fraction of the cost of appointing private counsel. The variety of approaches that states could use was approvingly noted by the Supreme Court in *Bounds*.[217]

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matters. *See* Corpus v. Estelle, 409 F. Supp. 1090, 1094 (S.D. Tex. 1975), *aff'd*, 551 F.2d 68 (5th Cir. 1977). The Texas state bar operates a program of assistance on civil rights claims. *See* note 136 *supra*. Financial and technical assistance to the states should be available in most instances from the federal Law Enforcement Assistance Administration and the Legal Services Corporation.

[213] *See* p. 636 *supra*.

[214] The Aldisert Committee said that "[i]n places where counsel is readily available, cases appear to be more ably presented; some frivolous cases are 'weeded out'; 'shotgun' allegations are eliminated in favor of more specific, limited allegations; and counsel is often able to bring about an administrative resolution of the complaint," Aldisert Report, *supra* note 12, at 11. *See also* Zeigler & Hermann, *supra* note 58, at 206–07. A Maryland assistant attorney general believes that a legal assistance program would have a beneficial "screening" effect, eliminating many letters of complaint that should never ripen into federal litigation. Letter to the author from Clarence W. Sharp (Nov. 16, 1977).

[215] American Bar Association Joint Committee on the Legal Status of Prisoners, *supra* note 160, at 428–29 (1977). *See also* American Bar Association Resource Center on Correctional Law and Legal Services, Providing Legal Services to Prisoners (May 1973). The New York program, with one lawyer for every 540 prisoners instead of the recommended one for every 400, found that it could not meet demand for legal services. Prisoners' Legal Services of New York, *supra* note 212, at 17.

[216] 430 U.S. 817, 828 (1977). While North Carolina chose libraries to meet this requirement, the provision of books is not the better solution. They are worthless to prisoners who lack the reading and writing skills or legal understanding to use them. *See id.* at 836 (Stewart, J., dissenting). Access to law books is no substitute for the counseling and drafting that must go into the preparation of litigation. While *Bounds* addressed itself only to the preparation stage, assistance in court is equally indispensable.

[217] 430 U.S. at 829–32 & nn.18–23.

VI. Conclusion

As Louis D. Brandeis once noted, "[s]unlight is said to be the best of disinfectants." [218] Outside scrutiny of the prison inner sanctum — through responsive grievance procedures, investigation by independent counsel, on-site legal services and, ultimately, more focused judicial review — will let some sunlight in. It is itself likely to reduce some of the abuses and ameliorate some of the conditions that cause prisoners to file lawsuits. The historical absence of such scrutiny meant that institutional intrusions on individual liberties went unquestioned. The current rash of section 1983 suits is a reaction to this exemption from the rule of law. It is also an opportunity to develop mechanisms for both fair and efficient resolution of prisoner grievances, in prison and in court.

[218] L. Brandeis, Other People's Money 92 (1914).

APPENDIX A

PRISONER SECTION 1983 CASES FILED IN FEDERAL DISTRICTS*

District	1978	percent increase	1977	percent increase	1976
1. E.D. Va.	833	59.6	522	31.8	395
2. M.D. Fla.	686	8.4	633	−3.1	653
3. W.D. Va.	424	35.9	312	28.9	242
4. N.D. Ill.	377	30.0	290	23.4	234
5. S.D. Tex.	360	27.2	283	−6.3	302
6. D. Md.	347	34.5	258	45.8	179
7. S.D. Ohio	314	188.1	109	−1.8	111
8. E.D.N.C.	236	55.3	152	58.3	96
9. W.D. Mo.	227	32.0	172	17.0	147
10. E.D. Mich.	212	60.6	132	38.9	95
11. M.D. La.	191	114.6	89	−31.0	129
12. D.R.I.	182	7.7	169	745.0	20
13. M.D. Pa.	175	2.3	171	6.9	160
14. S.D. Ala.	163	19.9	136	13.3	120
15. E.D. Pa.	159	9.7	145	55.9	93
16. D.N.J.	154	27.3	121	−6.9	130
17. W.D. Tex.	150	42.9	105	52.2	69
18. E.D. Ill.	148	202.0	49	53.1	32
19. D. Conn.	141	62.1	87	33.8	65
20. D. Del.	134	74.0	77	75.0	44
21. N.D. Fla.	130	52.9	85	21.4	70
22. N.D. Tex.	127	−18.1	155	2.6	151
23. D.S.C.	123	0.8	122	25.8	97
24. S.D. Fla.	121	−1.6	123	75.7	70
25. N.D. Ga.	116	50.6	77	−3.8	80
26. D. Ariz.	115	4.5	110	27.9	86
27. M.D. Ala.	114	−21.9	146	37.7	106
28. W.D. Mich.	112	16.7	96	13.9	79
29. S.D.N.Y.	111	−31.5	162	−1.8	167
30. D.D.C.	109	29.7	84	−28.8	118
31. D. Colo.	106	107.8	51	142.9	21
32. N.D.N.Y.	103	−1.0	104	−18.1	127
33. N.D. W. Va.	103	−16.3	123	64.0	75

*Numbers of filings taken from ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1978 ANNUAL REPORT OF THE DIRECTOR (1978); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR (1977); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR (1976). The percent figure after each year indicates the increase or decrease from the previous year's filings. The districts are ranked by number of cases filed in fiscal year 1978.

APPENDIX A (*continued*)

District	1978	percent increase	1977	percent increase	1976
34. D. Ore.	102	251.7	29	38.1	21
35. N.D. Ala.	100	35.1	74	−7.5	80
36. E.D.N.Y.	94	1.1	93	3.3	90
37. W.D. Pa.	93	0.0	93	24.0	75
38. D.N.M.	92	95.7	47	38.2	34
39. E.D. Ark.	84	−35.4	130	−5.8	138
40. W.D.N.Y.	82	13.9	72	100.0	36
41. W.D.N.C.	82	78.3	46	−13.2	53
42. S.D. Iowa	79	38.6	57	−55.1	127
43. N.D. Cal.	78	30.0	60	−16.7	72
44. W.D. Ky.	77	−14.4	90	200.0	30
45. S.D. Ga.	71	−42.3	123	36.7	90
46. E.D. Cal.	70	−2.8	72	−6.5	77
47. E.D. Okla.	68	11.5	61	48.8	41
48. W.D. Wis.	67	−1.5	68	−67.5	209
49. E.D. Tex.	67	−9.5	74	−49.3	146
50. D. Kan.	66	24.5	53	−13.1	61
51. S.D. Ill.	65	400.0	13	160.0	5
52. M.D.N.C.	60	−7.7	65	−13.3	75
53. E.D. La.	58	16.0	50	138.1	21
54. D. Nev.	54	31.7	41	36.7	30
55. N.D. Ohio	53	−1.9	54	50.0	36
56. E.D. Mo.	52	36.8	38	−41.6	64
57. N.D. Miss.	51	88.9	27	170.0	10
58. D.N.H.	51	88.9	27	−60.9	69
59. D. Neb.	50	38.9	36	38.5	26
60. N.D. Ind.	50	354.5	11	−15.4	13
61. E.D. Tenn.	50	16.3	43	126.3	19
62. D. Mass.	50	−7.4	54	−28.9	76
63. E.D. Wash.	48	−14.3	56	93.1	29
64. W.D. Tenn.	46	17.9	39	50.0	26
65. W.D. Okla.	45	50.0	30	76.5	17
66. C.D. Cal.	43	−45.6	79	−33.1	118
67. M.D. Ga.	41	5.1	39	11.4	35
68. D.P.R.	40	81.8	22	214.3	7
69. E.D. Wis.	37	−24.5	49	−38.7	80
70. M.D. Tenn.	36	−7.7	39	39.3	28
71. S.D. Ind.	29	222.2	9	−35.7	14
72. E.D. Ky.	26	13.0	23	130.0	10
73. D. Minn.	25	13.6	22	37.5	16

APPENDIX A (*continued*)

District	1978	percent increase	1977	percent increase	1976
74. S.D. W. Va.	24	200.0	8	−65.2	23
75. D. Vt.	24	140.0	10	100.0	5
76. W.D. La.	21	−8.7	23	0.0	23
77. N.D. Okla.	20	122.2	9	—	0
78. D. Wyo.	15	−59.5	37	37.0	27
79. W.D. Wash.	15	87.5	8	−27.3	11
80. N.D. Iowa	14	250.0	4	100.0	2
81. D. Idaho	13	116.7	6	−62.5	16
82. S.D. Miss.	11	37.5	8	−11.1	9
83. W.D. Ark.	10	0.0	10	−65.5	29
84. S.D. Cal.	7	16.7	6	50.0	4
85. D. Me.	6	500.0	1	−66.7	3
86. D. Mont.	6	−79.3	29	314.3	7
87. D. Alaska	5	−61.5	13	550.0	2
88. D.N.D.	2	100.0	1	−75.0	4
89. D.S.D.	2	−71.4	7	133.3	3
90. D. N. Marianas	0	—	0	—	0
91. D. Guam	0	−100.0	1	−50.0	2
92. D. Utah	0	−100.0	8	−55.6	18
93. D. Hawaii	0	−100.0	2	0.0	2
94. D.V.I.	0	−100.0	3	200.0	1
95. D.C.Z.	0	—	0	—	0

APPENDIX B

PRISONER SECTION 1983 CASES IN FIVE INDIVIDUAL DISTRICTS

	D. Mass.	E.D. Va.	N.D. Cal.	E.D. Cal.	D. Vt.
Prisoner § 1983 cases filed, 1978	50	833	78	70	24
Percentage of prisoner § 1983 cases among all civil, 1978	1.4	29.3	2.5	7.2	8.4
State prison population, 1978*	2695	7805	21,088		419
Section 1983 cases filed per 100 prisoners, 1976*	2.8	8.2	1.3		1.2

* Statewide figure for all districts.

APPENDIX B (*continued*)

	D. Mass.	E.D. Va.	N.D. Cal.	E.D. Cal.	D. Vt.
Percentage of prisoner § 1983 cases terminated before issue joined	68.0	64.0	77.7	80.4	55.6
Percentage terminated after issue, but before pretrial, 1976	26.8	32.3	18.8	19.6	33.3
Prisoner § 1983 cases tried, 1976	0	9	1	0	1
Percentage of cases from most frequent institution	44.4	22.5	34.0	44.8	78.4
Percentage of cases from local jails	20.4	15.0	17.4	6.7	0
Percentage filed in forma pauperis	85.7	93.0	84.7	86.5	94.6
Percentage filed by attorneys	15.0	0	5.6	4.3	21.6
Percentage of cases with appointed counsel	39.1	5.3	2.8	0	62.2
NATURE OF CLAIMS					
Percentage of cases with claims involving:					
Medical problems	20.3	25.7	24.3	19.6	5.4
"Legal" and access to courts	10.5	9.6	36.1	35.0	64.9
Property loss or deprivation	12.8	11.2	13.2	14.1	8.1
Transfers	13.5	4.3	2.1	6.7	70.3
Classification issues	23.3	3.2	4.9	8.0	8.1
Poor conditions in general	12.0	12.8	12.5	5.5	5.4
Disciplinary procedures	18.8	3.7	6.3	16.6	16.2
Visiting	8.3	3.2	6.9	7.4	56.8
Brutality	7.5	8.6	10.4	10.4	8.1
Guard harassment	8.3	11.2	13.2	17.8	2.7
Grooming restrictions	0	0	2.8	1.8	0
Search or shakedown	3.0	1.6	1.4	8.6	2.7
Religious problems	2.3	3.7	2.1	4.3	0
Mail censorship	3.0	7.0	13.9	16.0	0

APPENDIX B (*continued*)

	D. Mass.	E.D. Va.	N.D. Cal.	E.D. Cal.	D. Vt.
Racial discrimination	0.8	4.3	9.7	4.9	0
Solitary confinement/segregation	6.0	14.4	9.7	11.7	5.4
Prison rules	8.3	1.6	4.2	1.8	2.7
Other prisoner harassment	0.8	1.1	2.8	0	0
Sexual problems	0.8	1.1	1.4	0	0
Claims not relating to conditions of confinement	22.6	23.5	28.5	21.5	2.7
RELIEF SOUGHT					
Percentage of cases:					
Seeking injunction	66.9	27.8	50.7	57.1	78.4
Seeking compensatory damages	62.4	56.7	77.1	74.2	18.9
Seeking punitive damages	39.8	34.8	70.1	70.6	18.9
Not specifying relief sought	7.5	11.8	7.6	6.7	8.1
BURDEN ON DEFENDANTS AND COURTS					
Percentage of cases with no appearance for defendants	20.3	44.9	64.6	69.3	8.1
Percentage of cases with interrogatories filed	5.3	4.8	6.3	9.2	24.3
Percentage of cases with answers to interrogatories filed	3.8	1.6	4.2	3.1	18.9
Percentage of cases with depositions taken	1.5	0	1.4	1.2	10.8
Percentage of cases with some magistrate involvement	81.2	15.5	2.1	0	0
for in forma pauperis determination	73.7	10.7	0	0	0
for evidentiary hearing or discovery	2.3	0	1.4	0	0
Total number of court days, hearing or trial	20	5	9	1	9
Percentage of cases with appeals taken	7.5	9.6	12.5	7.4	8.1

APPENDIX B (*continued*)

	D. Mass.	E.D. Va.	N.D. Cal.	E.D. Cal.	D. Vt.
RELIEF OBTAINED					
Number of TRO's granted/applications	5/38	0/12	0/19	1/30	1/8
Number of preliminary injunctions granted/applications	2/34	0/15	0/54	2/77	1/30
Number of cases with relief obtained:					
Injunction	1	0	0	2	0
Damages	0	2	0	0	0
EFFECT OF ATTORNEY INVOLVEMENT					
Number of cases with TRO granted:					
Filed by attorney	4	0	0	1	1
Attorney appointed	0	0	0	0	0
Other attorney appearance	1	0	0	0	0
Pro se	0	0	0	0	0
Number of cases with preliminary injunction granted:					
Filed by attorney	2	0	0	2	0
Attorney appointed	0	0	0	0	1
Other attorney appearance	0	0	0	0	0
Pro se	0	0	0	0	0
Number of cases with interrogatories answered:					
Filed by attorney	2	0	1	3	2
Attorney appointed	2	2	1	0	4
Other attorney appearance	1	0	3	1	2
Pro se	0	1	1	1	0
Number of cases with depositions taken:					
Filed by attorney	2	0	1	2	1
Attorney appointed	0	0	0	0	3
Other attorney appearance	0	0	1	0	0
Pro se	0	0	0	0	0
Number of cases with trials or hearings:					
Filed by attorney	5	0	1	1	0
Attorney appointed	1	5	0	.0	2
Other attorney appearance	1	3	2	0	0
Pro se	0	0	0	0	0

[From the San Francisco Chronicle, Feb. 22, 1979]

EDITORIAL—RIGHTS OF HELPLESS

The rights of the mentally ill, disabled or retarded are deserving of the highest degree of protection, yet we frequently hear how they are neglected and ignored in public institutions. Such uncivilized heartlessness violates the constitutional and legal rights of helpless people. The federal government has an interest in this.

We favor Representative Robert W. Kastenmeier's approach to the problem. His bill, H.R. 10, would give the Attorney General authority to intervene in federal court to protect persons institutionalized by the states—children, the elderly, the mentally impaired, and prisoners. Where the Attorney General can show a "pattern or practice" of denial of rights he could sue to vindicate them. Kastenmeier's humane legislation should be enacted.

[From the Detroit News, Mar. 3, 1979]

VULNERABLE CITIZENS

This nation's institutionalized citizens are its most vulnerable.

Hidden behind walls, inarticulate and powerless, their rights are in the hands of institutional guardians who can both systematically abuse and silence them. Unfortunately, the state officials who govern institutions may either ignore rights violations, or due to political or financial considerations, find themselves unable to halt them.

Last year, for example, Michigan was shocked to learn from newspaper reports of abuses and neglect at the Plymouth Center for Human Development. A special interest group, the Michigan Association for Retarded Citizens, filed suit against the state, and a federal judge ordered the state to remedy the Plymouth situation.

Thus, it was newspaper reporters, a special interest group, and a federal judge who protected the rights of Michigan's citizens instead of the state or its institutional officials. When forced to act, the state moved slowly, citing financial and organizational problems. As late as February 6, 1979, The News reported that the state had failed to comply with all the federal judge's improvement orders.

Clearly, this nation's institutitonalized people can't always rely on newspapers or special interest groups to go to the rescue. Such champions often lack the financial and legal resouces to fight the power of the state and its institutions. The federal government would then seem to be the final protector of constitutional rights. Yet, when the U.S. attorney general sought to step into the legal breach and file suit on behalf of the institutionalized in three recent cases, federal courts refused to grant permission, pointing to the lack of any specific statutory authority for federal suit.

To provide that statntory language, Representative Robert Kastenmeier, D-Wisconsin, has introduced bill H.R. 10. It would grant authority to the U.S. attorney general to initiate civil suits in Federal Court to protect the rights of institutionalized children, elderly, mentally impaired persons, and prisoners.

We think it's a good idea. The federal ability to file legal actions against states would be sufficiently restricted. Before initiating a suit, the U.S. attorney general would have to believe a rights violation resulted from a state or municipal institution's "pattern or practice," rather than from a single incident. If a suit is considered justified, the federal government would have to first notify the state's governor, attorney general, and institution director about the alleged violation, propose reforms, and explain available federal financial assistance. The U.S. attorney general would also have to certify that the state has had a reasonable amount of time to correct the problems before filing suit.

We do not find any of this to be, as opponents of the bill claim, an undue intervention in the administration of state affairs or a usurpation of state powers. The state has time to correct the situation on its own and with federal aid. If the state is unwilling or unable to protect the constitutional rights of its citizens, the federal government has a duty to intervene.

Opponents of the bill also say that the cost of such litigation will actually drain state funds from the very institution that needs improvement or from other important community services. Kastenmeier's bill, however, not only makes litigation the route of last resort but prohibits the United States from seeking damages.

The Plymouth Center experience should indicate that states can both fail to police institutions and fail to improve them swiftly. The goad of public opinion

and the efforts of citizens groups are not enough. State failure to protect the institutionalized is a national problem, and expensive problem, and a human rights problem, all of which make it a problem—when all else fails—fitting for federal attention.

[From the Washington Post, Feb. 24, 1979]

PROTECTING THE RIGHTS OF CITIZENS

It is understandable that the government of the United States has difficulty protecting the rights of its citizens in faraway places like Iran and Afganistan. They are beyond American control—and occasionally beyond their own. It is not so easy to understand why the same government has difficulty protecting the constitutional rights of certain groups of citizens in places like Maryland and Montana. But it does—if those citizens happen to be inmates of state institutions. Even if the Department of Justice knows those inmates are being systematically abused, it can't do anything about it.

Legislation to change that situation has been fnily debated on Capitol Hill in the last two years. It would give the Department of Justice authority to file lawsuits in federal court on behalf of such inmates. Once the cases are in the courts, judges can enter whatever orders are needed to protect the rights of prisoners in jails or patients in mental hospitals or juveniles in detention facilities. As the law stands now, those cases can reach court only if the inmates bring the lawsuits themselves. The problems of that situation are obvious; mental patients may not know, for example, that they are being deprived of their rights and, even if they do know it, their ability to initiate a lawsuit is limited.

The House of Representatives passed this legislation overwhelmingly last summer, but it died in the Senate after it was vigorously opposed by the National Association of State Attorneys General. A majority of its members regard the bill as an attack on states rights. They are right in the sense that the federal government should not have to compel state institutions to do what the Constitution requires them to do. But the evidence is overwhelming that some of those institutions do not give their inmates the rights to which they are entitled—and will not do so unless a federal court forces them to change their ways.

The legislation has been reintroduced this winter and is now pending before the Senate Judiciary Committee. It ought to be speeded on its way to passage. The federal government has enough problems protecting the rights of citizens abroad without being denied—on so small a technicality—the ability to protect them at home.

[From the New York Times, Apr. 18, 1979]

THE RIGHTS OF THE FORGOTTEN

Thousands of institutionalized Americans suffer from neglect and even brutality. They are the mentally ill, the retarded and others in state custody. The states are responsible for treating them humanely but violations are common. The courts have found that in some cases inmates are unlawfully deprived of liberty and subjected to cruel and unusual punishment.

A proposal now before Congress would allow the United States Attorney General to sue to correct wholesale patterns of abuse. A similar measure passed the House last year, but was stalled in the Senate. We hope the Senate takes it more seriously this year.

The remedy of bringing suit against the states has its critics, most notably the Association of State Attorneys General. This group argues on the basis of states' rights. States do, of course, have rights, but that does not mean they have immunity from meeting their constitutional duty to provide fair treatment to the institutionalized.

Already, lawsuits have been effective in bringing humane practices into once-impenetrable institutions. These suits, usually initiated by understaffed organizations of civil libertarians and poverty lawyers, have forced the courts to look into some very dark corners—and ordered the states to let in some sunlight. But such private groups cannot alone handle the lawsuits, nor should they. Lawful treatment for the institutionalized should not have to depend on the hit-or-miss availability of lawyers willing to take up a cause. It is more fitting to call on the legal talent, investigative resources and prestige of the United States. Few bills offer so much hope to so many forgotten Americans.

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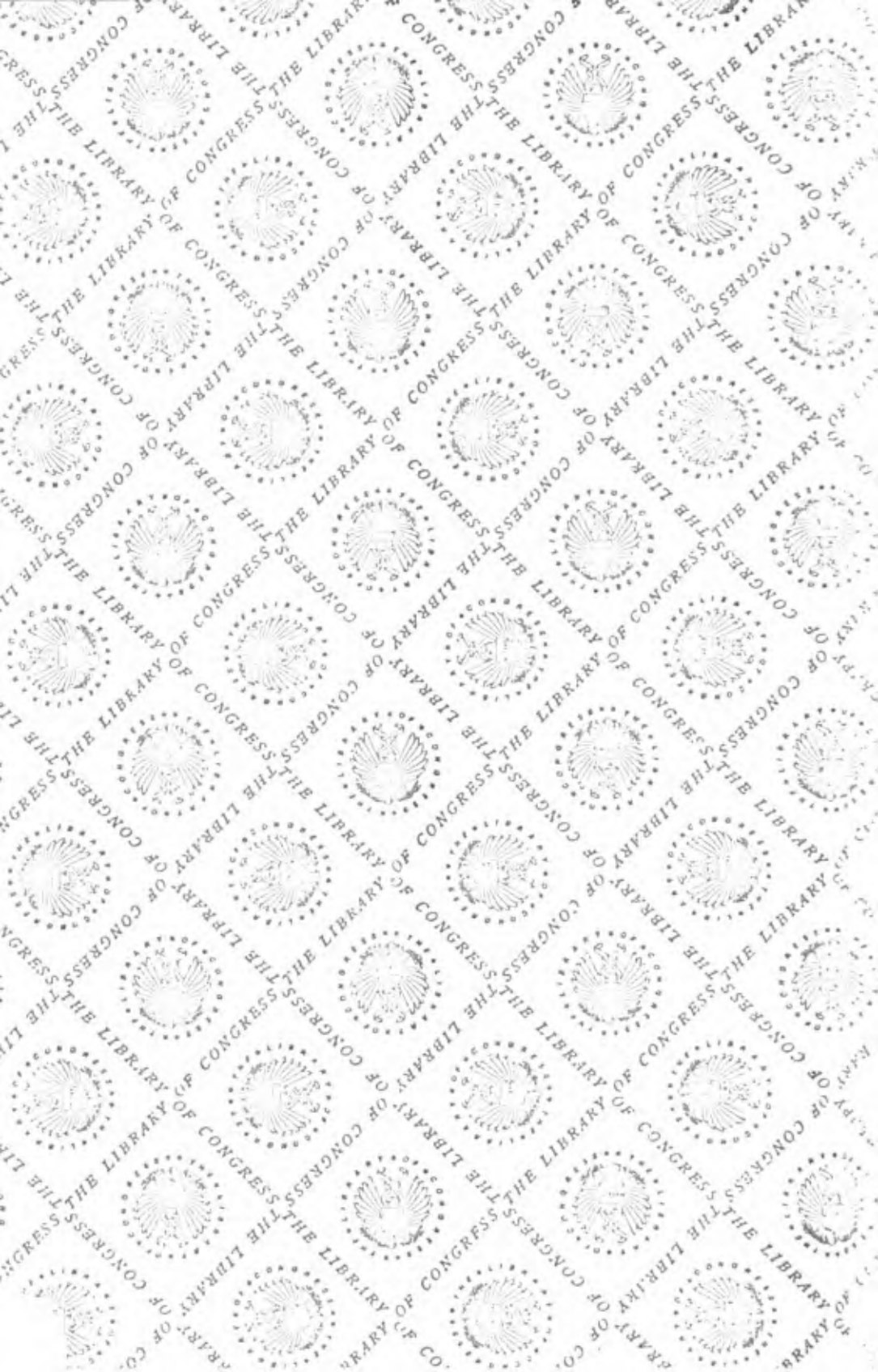
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